

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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BROWN & WILLIAMSON TOBACCO CORPORATION, :
BRITISH-AMERICAN TOBACCO COMPANY, LIMITED, :
and MOORGATE TOBACCO CO., LIMITED, :

Plaintiffs, :

-against- :

PHILIP MORRIS INCORPORATED, :

Defendant. :

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Deposition of Lorillard,
by RICHARD H. ORCUTT, held at the offices of
Conboy, Hewitt, O'Brien & Boardman, Esqs.,
20 Exchange Place, New York, New York, on
the 21st day of May, 1981, at 10:15 o'clock
a.m., pursuant to Subpoena, before Gail
F. Richman, C.S.R., a Notary Public of
the State of New York.

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APPEARANCES:

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BY: MYRON D. COHEN, ESQ.
ANTHONY L. FLETCHER, ESQ.
-and-
TIMOTHY BROAS, ESQ. Of Counsel

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New York, New York 10019

ALSO PRESENT:

VIRGINIA RICHARD, ESQ.
STEVEN WEINBERG, ESQ.
DENISE KEANE, ESQ.

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IT IS HEREBY STIPULATED AND AGREED by
and between the attorneys for the respective
parties herein, that filing and sealing be
and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form
of the question, shall be reserved to the
time of the trial.

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be signed and
sworn to before any officer authorized to
administer an oath, with the same force and
effect as if signed and sworn to before the
Court.

IT IS FURTHER STIPULATED AND AGREED
that a copy of the within deposition shall
be furnished to counsel for the Lorillard
and the Plaintiffs.

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R I C H A R D H. O R C U T T, called as
a witness, having been first duly sworn by
the Notary Public, was examined and
testified as follows:

EXAMINATION

BY MR. COHEN:

Q. Please state your name for the record.

A. Richard H. Orcutt.

Q. Where do you reside?

A. [DELETED]

Q. Mr. Orcutt, would you describe your
career with the Lorillard organization and its
predecessors.

A. It commenced in February of 1953 when I
was hired as a sales representative in Syracuse,
New York. In November of 1954 I was promoted to
assistant division manager and transferred to
Detroit, Michigan.

In 1956 I was promoted to division
manager in Detroit, and in 1959, late '59 or '60,
I was promoted to field manager with headquarters
in Detroit, Michigan.

In 1964 I accepted a transfer to our

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international department and was transferred to Switzerland. Our headquarters was in Zug, Switzerland.

In 1965 I accepted a promotion and transferred back to New York as export sales manager in the international department.

In 1967 I was promoted to co-managing director of the international department; in 1968-69 as manager -- director, rather, of the international department, and in 1970 I was appointed vice president, managing director of the international department. And on January 1st, 1978, I was appointed vice president sales, Lorillard domestic.

In a year -- in 1979 I was appointed senior vice president, sales, Lorillard domestic, and that is the position that I occupy today.

Q. Of those positions, sir, which entailed executive responsibilities in the international division?

A. The period between 1964 and 1977.

Q. Once again, if you wouldn't mind, what was the nature of your duties during that period of time?

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2 A. It originated as assistant managing
3 director of our European region. That was for the
4 year period '64-65. After that it was as export
5 sales manager, and in the subsequent positions
6 that I held, I had supervisory and executive
7 responsibility.

8 Q. Your career then has taken you through
9 the field sales force domestically in the United
10 States as well as giving you supervisory and
11 executive responsibilities for Lorillard's
12 international operations?

13 A. Yes.

14 Q. So you've sort of run the gamut of the
15 entire cigarette operation, have you not, in the
16 sales and marketing area?

17 A. Yes.

18 Q. At what point in your career did you
19 acquire responsibility, if you did, for the
20 operation and supervision of Lorillard's
21 trademarks worldwide? By that I don't necessarily
22 mean that you did it, but that you supervised
23 people who did.

24 A. That responsibility would have come in
25 in the period as co-managing director and the

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period thereafter.

Q. What period of time would that have been?

A. Approximately '67 through to mid 1977.

Q. How during your career with Lorillard has the organization been structured? I'm talking now in terms of the name changes of the organization and any mergers.

A. When I was first employed it was P. Lorillard Company, public company. And the name was subsequently changed to Lorillard Corporation. And then it was acquired by Loews Theatres, Inc., in November of 1968. It became a division of Loews Theatres, Inc.

Q. The international operation, has that been a division of the corporation as it existed from time to time or has it been a separate corporation as a subsidiary of the parent?

A. No, the international was a department or division of the corporation.

Q. What was the title or titles of the senior managing officials of the international division?

A. The senior title was director --

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international, and the senior title in the late '60's was changed to managing director and then to vice president - managing director.

Q. You've held all of those positions?

A. I have.

Q. Could you very briefly in a most general fashion capsulize the duties of the position which you held when you were the top dog in international?

A. To ensure that the plans that were laid out for international were effectively and positively executed in a positive way, to seek opportunities, growth opportunities for the international division -- department.

Q. Would that include new brands or new marks?

A. Not necessarily, no.

Q. What would be encompassed by that?

A. New business opportunities, new markets to open, markets presently opened that might present an opportunity for growth or opportunities for overseas manufacture through licensing.

Q. Then you would have had responsibility, would you not, for overseeing either yourself or

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2 through subordinates, of the operation of license
3 agreements in various parts of the world?

4 A. Yes.

5 Q. Did Lorillard International ever sell
6 brands overseas which were not sold within the
7 United States market?

8 A. Yes.

9 Q. Could you give us an example of one or
10 two.

11 A. Kent Special Mild in Europe.

12 Q. The principal brands of Lorillard over
13 the years of your employment have been Kent and
14 Old Gold?

15 A. Of Lorillard domestic?

16 Q. Yes, of Lorillard domestic.

17 A. Over the years Kent, True, Newport and
18 Old Gold.

19 Q. And abroad?

20 A. Abroad our principal mark was Kent.

21 Q. Approximately how many countries was
22 Kent sold as a product in?

23 A. In the area of 150.

24 Q. Did you have any other brands during
25 the period of your tenure as managing director of

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international which approached the number of countries in which Kent was sold?

MR. GOLDBRENNER: Could you read that back, please?

(Record read.)

A. True may fit that description.

Q. How many countries was True sold in?

A. 100.

Q. Within the organization how is a determination made to market a brand abroad in large scale fashion such as Kent and True? Are there committees set up or various individuals or departments which have responsibility for making that determination?

A. The recommendations would start from our local offices based upon their knowledge of our products and their performance in the United States. It could also be as a request from the head office to local markets that a particular brand was performing well here and to review the potential of its -- that it might have in a given market or markets and from that to make a recommendation back to home office.

Q. Within the home office what was the

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organizational structure which led to the making of the determination to market a brand worldwide.

A. Our advertising director would participate, our marketing director, our marketing service director, myself.

Q. Were there regularly-scheduled meetings of these individuals acting as a committee or was it on an ad hoc basis?

A. No, it would follow both forms; an ad hoc depending upon what recommendations came in and on a regular basis at our annual or semi-annual reviews of our business.

Q. Was the marketing of Kent Golden Lights or Kent Special Mild ever discussed at a meeting of such individuals?

A. Yes.

Q. Do you have any notes or documents which would enable you to determine the first time there was such a discussion?

A. I believe there would be, and there are probably documents that would show that we discussed it initially in 1975.

Q. Do you recall at what point in the year that might have been, the early stage, the medium?

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Could you --

A. It would fall within the second --
after the second quarter, between the second and
third quarter.

Q. Would that have taken place before the
test marketing of Kent Golden Lights in May?

A. Yes.

Q. Is it customary or was it then
customary within Lorillard to discuss the
worldwide marketing of a new mark prior to test
market?

A. Not generally.

Q. In this case do you have a recollection
as to why it was done?

A. Yes. It was our feeling that Kent
Golden Lights offered an excellent opportunity for
the overall development of the brand and that it
answered some problems that the parent brand had,
and it was the feeling that it would be successful
in the United States, and that success would give
us a platform to carry it worldwide.

Q. You mentioned that Kent Special Mild
was also discussed in this connection.

A. Not in that connection.

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Q. Was Kent Special Mild regarded at least initially as a brand to be limited to the European market?

A. Yes, it was.

Q. Do you recall the reasoning process of your group which led to the determination at least initially to regard Kent Golden Lights as having potential for worldwide sales as distinguished from Kent Special Mild which would be limited to Europe?

A. Yes. Basic -- some of the basic philosophies and experience of the international marketplace as they relate to U.S. brands, that it endeavored to maintain the worldwide marketing, the presentation of the product in the same format that is used in the United States, to present it worldwide in the same basic package, advertising where possible and in the same formulation where possible.

Q. This had been true, I take it then, of your marketing of Kent?

A. We endeavored to pursue that course, yes.

Q. And it also would have been true with

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respect to True cigarettes?

A. Yes, sir.

Q. Was there a third or would it have been basically those two?

A. No, we manufactured Newport overseas, and we exported other products, Old Gold, and we endeavored that same -- to pursue the same guidelines with those products.

Q. To sum up your testimony, right from the beginning you envisioned Kent Golden Lights as a worldwide mark?

A. Yes.

Q. Since the early 1970's you had had overall responsibility for the general supervision of the license agreement and technical assistance agreement relating to the manufacture and sale of Kent cigarettes in Australia, had you not?

A. Yes.

MR. COHEN: Would you mark these documents, please, as Philip Morris Exhibits 1, 2 and 3.

For the record, maybe I ought to describe them. A letter dated October 26th, 1970, from S.Y. Gresham to Mr. D. Gallie, will be

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Exhibit 1; a letter dated October 26th, 1970, from Mr. Gresham to Mr. Orcutt; and a letter dated October 5, 1970, from Mr. Orcutt to Mr. Gresham will be Exhibit 3.

(Whereupon, documents above referred to were marked as Defendant's Orcutt Exhibits 1, 2, and 3 for identification, as of this date.)

(Recess taken.)

MR. COHEN: Would you mark as Defendant's Orcutt Exhibit 4, a memorandum with enclosure dated March 11, 1970, from William Lee to Messrs. Orcutt and Bernard; and as Defendant's Orcutt Exhibit 5 a memorandum dated October 5, 1970, from Orcutt to Gallie.

(Whereupon, documents above referred to were marked as Defendant's Orcutt Exhibits 4 and 5 for identification, as of this date.)

Q. Mr. Orcutt --

A. I haven't read it yet, excuse me.

MR. GOLDBRENNER: Wait until he asks you a question first.

MR. COHEN: The questions will all pertain to these as a group, so he can read it first.

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MR. GOLDBRENNER: Fine, I didn't want to hold you up.

Q. Mr. Orcutt, shortly after assuming executive responsibilities in the international area that, you had occasion to consider a request, did you not, of Philip Morris for changes in the licensing agreement in Australia resulting from its takeover of Godfrey Phillips?

A. Yes.

Q. In the course of the internal discussion at Lorillard, was consideration given to the appointment of other distributors in Australia for your product, other potential licensees?

A. Discussions were held to that effect.

Q. What companies were considered?

A. The two manufacturers remaining -- other manufacturers in Australia.

Q. Which were?

A. Rothmans and W.D. & H.O. Wills.

Q. I'd like you to peruse defendant's exhibits in this deposition for identification, 1 through 5, and I ask you whether or not these represent items of correspondence which were

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either received or sent or made internally at Lorillard.

A. They all appear to be.

Q. Thank you.

Defendant's Exhibits 5, 1, 2 and 3 refer to meetings scheduled or held between Mr. Gresham of Gresham Distributors Properties and various Lorillard representatives. Were Mr. Gresham's proposals ever seriously considered by Lorillard? I realize this has been some time ago.

A. They were given to my recollection, were given serious consideration.

Q. What were the factors which led to their rejection and the determination to continue the existing licensee relationship in Australia?

A. Judgment that Lorillard's continued operation as a licensor in Australia would be adequately served by the successor to Godfrey Phillips Pty. Ltd.

Q. What were the factors that led to that conclusion?

A. Performance in line with the licensee obligations; relationships developed over the years between Lorillard and Godfrey Phillips.

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corporately and between management personnel.

Q. Was any thought given at Lorillard to cancelling the license arrangement and making an indirect investment, what you referred to in your letter to Mr. Gallie of October 5 as bricks and mortar?

A. There was -- there would have been some thought given to that.

Q. Do you recall why that option was rejected?

A. It was not as -- my recollection is it would not be as viable as continuing our license agreement.

MR. COHEN: Would you mark as Defendant's Orcutt Exhibit 6 for identification an agreement between P. Lorillard Company and Godfrey Phillips, dated December 1, 1963; Defendant's Orcutt Exhibit 7 is a letter dated January 3, 1964, from P. Lorillard to Godfrey Phillips; as Defendant's Orcutt Exhibit 8, a letter dated February 7, 1964, from the secretary at P. Lorillard to William O'Meara; as Defendant's Orcutt Exhibit 9, a letter dated February 7, 1964, from the secretary of Lorillard to Messrs. Davies

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and Darby; as Defendant's Orcutt Exhibit 10, a letter dated November 19, 1965, from Gordon Fraser to Cedric Paynter; as Defendant's Orcutt Exhibit 11, a file memorandum from Mr. Darby to Messrs. Grant and Bernard, dated April 6, 1966; Defendant's Orcutt Exhibit 12, a letter with enclosure dated April 10, 1970, from William O'Connor to William Lee; as Defendant's Orcutt Exhibit 13, a letter from Mr. Hurley to P. Lorillard International, S.A., dated November 27, 1970; as Defendant's Orcutt Exhibit 14, a letter dated December 1, 1970, from Mr. Hurley to Lorillard; as Defendant's Orcutt Exhibit 15, a letter with enclosures dated December 8, 1970, from Mr. Orcutt to Godfrey Phillips. One such enclosure is a letter from Mr. Orcutt to Godfrey Phillips, dated December 8th, a second is a letter from Mr. Spear of P. Lorillard International, S.A. to Godfrey Phillips dated December 15.

Mark as Defendant's Orcutt Exhibit 16, a letter with enclosure from Donald Healy to Hamilton Hurley, dated March 22, 1972; Defendant's Orcutt Exhibit 17 is a memorandum with enclosure from Arthur Stevens to Mr. Hein, dated May 2, 1972;

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as Defendant's Orcutt Exhibit 18, a memorandum from Mr. Hein to Mr. Rice, dated July 6, 1972, which has annexed two enclosures, one of which is a memorandum from Mr. Rice to Mr. Hein, dated July 17, 1972; the second is a letter from Mr. Hein to Mr. Curlewis, dated September 17, 1973.

Defendant's Orcutt Exhibit 19 is a letter with an enclosure from Mr. Hein to Mr. Curlewis, dated September 21, 1973, the enclosure being a draft dated December 14, 1973, from Lorillard to Godfrey Phillips.

Defendant's Orcutt Exhibit 20 is a memorandum from Mr. Hein to Mr. Gastman, dated October 4, 1973.

Defendant's Orcutt Exhibit 21 is a memorandum from Mr. Orcutt to Mr. Hein, dated October 25, 1973; as Defendant's Orcutt Exhibit 22, a letter from Mr. Hurley to Mr. Orcutt, dated November 22, 1974; as Defendant's Orcutt Exhibit 23, a telex from Mr. Orcutt to Mr. Hurley, dated December 3, 1974; as Defendant's Orcutt Exhibit 24, a telex dated December 9, 1974, from Mr. Hurley to Mr. Orcutt; as Defendant's Orcutt Exhibit 25, a memorandum from Mr. Hein to Mr. Orcutt, dated

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December 11, 1974; as Defendant's Orcutt Exhibit 26, a telex from Mr. Hein to Mr. Hurley, dated December 27, 1974. Defendant's Orcutt 27 is a letter with one enclosure dated January 3, 1975, the enclosure is a letter dated December 16, 1974, from P. Lorillard to Philip Morris, Ltd. The letter of January 3, '75, that I mentioned to begin with is from Mr. Hein to Mr. Hurley.

Defendant's Orcutt Exhibit 28 is a letter from Mr. Orcutt to Mr. Hurley, dated January 10, 1975.

(Whereupon, documents above referred to were marked as Defendant's Orcutt Exhibits 6 through 28 for identification, as of this date.)

MR. GOLDBRENNER: For the record, to the extent that any of these documents are communications between counsel and client and are for any reason subject to Lorillard's claim to an attorney/client privilege, we have not waived that privilege.

These documents were not produced by us, nor did they come from our files today, but rather were presented by Philip Morris.

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2 MR. COHEN: I think any objections
3 raising a claim of privilege would be preserved by
4 the nature of the general stipulations which the
5 deposition is proceeding, in any event. Our
6 position, of course, would be that to the extent
7 we received them from BAT it probably would be a
8 presumption that any privilege would be waived by
9 your giving them to a third party. That's
10 something I don't think we need to determine at
11 this point.

12 Q. The question, Mr. Orcutt --

13 MR. GREENBAUM: I'd like to note too,
14 based on one of the prior depositions we had if
15 there was a waiver of any privilege it would only
16 relate to that particular document and not some
17 kind of general waiver; is that correct?

18 MR. COHEN: I'm not sure I understand
19 what you're saying.

20 MR. GREENBAUM: We got into this
21 discussion in a prior deposition concerning the
22 lawyer/client privilege, and we had agreed at that
23 time that if it turns out there was a waiver to a
24 specific point or a particular document, that the
25 waiver would be limited to that particular point

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2 or particular document, and it would not try to
3 build an edifice that there had been some kind of
4 a more general waiver of the lawyer/client
5 privilege.

6 MR. COHEN: The only problem I have
7 with that is to the extent that the document which
8 we might be contending constitutes a waiver of a
9 privilege refers to a particular transaction, I
10 think it would probably be our position that with
11 respect to that transaction at least the
12 attorney/client privilege had been waived.

13 MR. GREENBAUM: Let's leave that for
14 further determination.

15 MR. COHEN: I don't think we have to
16 determine it, and I don't think anything will turn
17 on that.

18 MR. GREENBAUM: I don't think it will.

19 MR. GOLDBRENNER: I think we can simply
20 say for the purposes of this deposition no party
21 is waiving any privileges that they may have.
22 That's all to be left to be argued at some later
23 time. If Mr. Orcutt answers questions with
24 respect to a particular document that might be
25 privileged, we are not thereby waiving that

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2 privilege.

3 Q. Mr. Orcutt, I think you've been given
4 by your counsel Exhibits 6 through 28. Could you
5 tell me, sir, whether or not these exhibits
6 represent correspondence or memoranda sent to, by
7 or received by Lorillard?

8 A. Six through 11 I have no recollection
9 of ever seeing before. Twelve through 27, 28
10 appear to be.

11 Q. Exhibits 6 through 11, I take it, are
12 the exhibits which have dates in the 1970's prior
13 to your assumption of executive responsibilities
14 in international for Lorillard?

15 A. Some -- yes.

16 Q. At the time you assumed those
17 responsibilities, however, you were, of course,
18 aware of the existence of a license agreement
19 between Lorillard and Godfrey Phillips, were you
20 not?

21 A. Yes.

22 Q. And also a technical assistance
23 agreement between P. Lorillard International, S.A.
24 and Godfrey Phillips?

25 A. Yes.

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Q. Where in the scheme of things at Lorillard existed P. Lorillard International, S.A. and what was it?

A. It was a wholly-owned subsidiary company of Lorillard.

Q. Where was it organized, sir, do you know?

A. Switzerland.

Q. Who did the managing directors of that organization report to by title?

A. To the director of international.

Q. Who would have been headquartered in New York?

A. Yes.

Q. Would you turn to the letter dated March 22, 1972, which appears to be a letter from Donald J. Healy to Hamilton Hurley, on which yourself and Mr. Rice are copied, Exhibit 16. Mr. Orcutt, who is Donald Healy?

A. Donald Healy at the time was marketing manager, Lorillard International.

Q. What would have been the general nature of his responsibilities?

A. Responsibilities for the marketing

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efforts for Lorillard International's business,
both exports from the U.S. and overseas
manufacturing.

Q. I notice a Mr. T.A. Rice is copied on
this letter. Who would that have been? What was
his title?

A. Mr. Rice was director - Far East
operations.

Q. Would Australia have come within the
penumbra of his responsibilities?

A. Yes.

Q. What is his first name?

A. Thomas.

Q. Would you now turn to the memorandum
from Mr. Stevens to Mr. Hein, Exhibit 17. You
will note that in the right-hand corner of the
exhibit there appears the following: "RH, don't
know anything about this. Let's talk. Jack,"
with a date which appears to be July 6th. Could
you tell us who that Jack might refer to?

A. J.N. Wisner.

Q. Who would he have been at the time?

A. Director, administrative services -
international.

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Q. What responsibilities would have been performed by the director of international services?

A. Administrative services..

Q. Administrative services.

A. Correlating the responsibility for export, receiving of export orders, expediting their passage through our New York office, our factory and to ensure that they were shipped on time properly.

Q. Referring to Exhibit 18, a memorandum dated July 6, 1972, and the enclosure to that exhibit, which is a memorandum dated July 17, 1972, from Mr. Rice to Mr. Hein, Mr. Orcutt, who was Mr. Hein, and what were his responsibilities?

A. Mr. Hein was director of business development - international.

Q. What were the nature of his responsibilities at the time?

A. To search out business opportunities for the growth and development of our international business.

Q. I take it then that he would have been responsible for determining whether or not a new

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brand might lead to an increased volume in a particular country?

A. He would play a part in that determination.

Q. Mr. Rice's responsibilities at that time?

A. Were director, Far East operations.

Q. What was encompassed by that?

A. He had responsibility for the day-to-day management of Lorillard International's business in the Far East.

Q. Referring to the enclosure to that exhibit, the memorandum dated July 17, 1972, from Mr. Rice to Mr. Hein, included in that memorandum is a statement "We certainly have nothing to lose, and we might gain royalties in excess of the postage required." The letter shows on its face that it is referring to a right on the part of the Australian licensee to market a Kent menthol.

How would royalties have been determined?

A. On sales of the license product.

Q. Would the royalty payments have been similar to the royalties contemplated on the sale

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2 of Kent generally? How would you have determined
3 or would you have determined at that point in time
4 what royalties in fact the Australian subsidiary
5 of Philip Morris would have been paying Lorillard
6 assuming they determined to market a Kent menthol?

7 A. The royalties -- there would have been
8 an endeavor to secure a higher royalty on this
9 product than on the parent, Kent.

10 Q. Do you have a present recollection of
11 discussions which might have been held within
12 Lorillard at the time of the request from Philip
13 Morris Australia to market a Kent menthol? Do you
14 have any recollection of discussions which were
15 held internally at Lorillard at that time as to
16 whether or not to grant the request?

17 A. Yes, I do.

18 Q. What were the factors which led to the
19 determination to tell them to go ahead?

20 A. That in our judgment that their
21 manufacture and sale of Kent menthol under license
22 would produce a higher volume of total Kent sales
23 in Australia.

24 Q. And that was an important factor for
25 you?

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A. Sales are, increased sales.

Q. Volume?

A. Increased sales which is volume.

Q. Prior to determining a negotiating posture for Lorillard in any negotiations with Philip Morris, Ltd. of Australia as to a proper royalty, wouldn't Lorillard have wanted a marketing plan from Philip Morris Australia?

A. Yes.

Q. You would have needed a marketing plan then which would contain sales objectives, advertising, promotional strategies, levels of expenditure for advertising?

A. That would be the desire.

Q. How would obtaining such a marketing strategy, marketing plan have been of use to you in determining the type of royalties that ought to be sought? What is the interaction?

A. There would be no major interaction between the two.

Q. I'd like to direct your attention to Exhibit 24, which purports to be a telex from Mr. Hurley to yourself. Who was Mr. Hurley?

A. Managing director of Philip Morris,

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Ltd. Australia.

Q. How many years had you known Mr. Hurley at the time this telex was received?

A. Approximately seven.

Q. Was this telex the first formal recognition which Lorillard had that Philip Morris Australia desired a rollover of the existing license agreement in Australia?

A. Let me read the full telex.

To my recollection, yes.

Q. Directing your attention to Exhibit 26, which is Mr. Hein's response to Mr. Hurley in which he states that he would prefer to leave the extension question open for the next meeting, was that a determination as to which you, yourself had been consulted?

A. I don't have a direct recollection of that.

Q. Do you have any present recollection at all concerning the subject matter of whether or not the license agreement should be extended, whether or not that subject came up on or about early 1975? You might take a look at the letter dated January 3, 1975, to Mr. Hurley from Mr. Hein

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on which you're copied. Does that refresh your recollection?

A. I'll read the letter.

MR. GOLDBRENNER: Off the record.

(Discussion off the record.)

MR. COHEN: Would you mark as Defendant's Orcutt Exhibit 29 a letter from Mr. Healy to Mr. Hurley, dated May 22, 1972.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 29 for identification, as of this date.)

Q. Mr. Orcutt, would you look, please, at Defendant's Exhibit 29. Is that a document which was sent out as far as you can tell, by Mr. Healy of Lorillard to Mr. Hurley?

A. It appears to be.

Q. Addressing yourself to that letter, would you just very briefly explain the reason why Mr. Healy wanted a detailed marketing plan, the document which is requested in that letter?

MR. GOLDBRENNER: We'll object to Mr. Orcutt being asked what was in Mr. Healy's head.

MR. COHEN: Let me reframe the question.

Q. Would you not agree that insofar as

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Lorillard's business practices were concerned, detailed marketing plans of the sort referred to in this letter are customary?

A. Yes.

Q. Why are they customary? What purpose do they serve in your business?

A. To give us a full understanding of how a licensee intends to market and support a licensed product.

MR. GOLDBRENNER: Mike, you're using the present tense. I assume you're referring to the time period involved.

MR. COHEN: Yes, I'm sorry. My questions are all in reference to that period of time.

A. As are my answers.

Q. During this period of time, the period of the 1970's, which is the period of time all my questions up to now have dealt with, was it customary for Lorillard to have received such marketing plans from its licensees with respect to present or proposed brands?

A. Not all licensees were as sophisticated as our Australian licensees, so they came in in

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various formats.

Q. Was Lorillard at this point in time requesting a detailed marketing plan from Philip Morris's Australian subsidiary irrespective of whether or not that subsidiary was to recommend the launch of Kent menthol?

In other words, I take it that the only time you would actually require a licensee to come forward, at least at this time, with a detailed marketing plan was once that licensee had reached the determination that it wanted to market the product or to launch the product?

A. Not necessarily.

Q. Could you give us some illustrations of instances in which Lorillard had requested a licensee to come forward with a detailed marketing plan of the type sought in this exhibit by Mr. Healy, prior to a recommendation by the licensee to market a new product or to launch a new product?

MR. GOLDBRENNER: Could you read that back.

(Record read.)

MR. COHEN: I'll rephrase the question.

Q. Mr. Healy in this letter states, "When

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2 you do recommend the launch of Kent menthol in
3 Australia, we will appreciate receiving a detailed
4 marketing plan." My question to you is can you
5 give us any illustrations of instances in which
6 Lorillard has requested during that period of time,
7 a licensee to come forward with a detailed
8 marketing plan without that licensee having
9 recommended the launch of a new product?

10 A. Yes.

11 Q. What would that have been?

12 A. The request for a marketing plan for
13 Kent Golden Lights launched in Australia.

14 Q. Can you give me any other example where
15 Lorillard had requested a licensee to come up with
16 a detailed marketing plan prior to that licensee
17 having recommended the launch of a new product?

18 A. Our Swiss licensee.

19 Q. Who would that have been?

20 A. F.J. Burris and Cie and our Finnish
21 licensee.

22 Q. Which would have been?

23 A. Strenberg, S T R E N B E R G.

24 Q. What product was considered then with
25 respect to those two licensees?

A. My recollection, and I'm on recollection here, would have been for Kent Deluxe 100 millimeter and for Kent Special Mild.

Q. What approximate period of time are we talking about when these requests went forth from Lorillard to those licensees?

A. For Kent Deluxe I can only deal from recollection on a broad frame, in the early '70's, and for Kent Special Mild it would be narrowed to 1975-76, I believe.

Q. Were those brands ultimately marketed by those licensees?

A. Yes.

MR. COHEN: Would you mark, please, as Defendant's Orcutt Exhibit 30 a letter dated May 22, 1972, from P. Lorillard by Donald Gallie, to Godfrey Phillips.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 30 for identification, as of this date.)

MR. COHEN: Would you mark as Defendant's Orcutt Exhibit 31 a letter dated May 22, 1972, from Mr. Orcutt to Godfrey Phillips.

(Whereupon, document above referred to

was marked as Defendant's Orcutt Exhibit 31 for identification, as of this date.)

MR. COHEN: We have marked for identification Defendant's Orcutt Exhibit 30 which is a letter from Donald Gallie to Godfrey Phillips, dated May 22, 1972, and a letter from Mr. Orcutt to Godfrey Phillips dated May 22, 1972, which is Exhibit 31.

Q. Would you look at those documents and tell us whether or not those were letters sent by Lorillard? Do they appear to be?

A. They appear to be, yes.

Q. Could you tell me whether or not Lorillard ever received copies back of these two letters signed by Godfrey Phillips or by Philip Morris Australia?

A. No, I don't recall.

Q. Can you tell me whether or not Kent menthol was ever marketed by Philip Morris Australia?

A. Ever manufacture Kent menthol?

Q. Yes, either Godfrey Phillips or Philip Morris, Ltd. in Australia?

A. I don't remember.

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2 Q. Do you have any recollection as to
3 whether or not there was ever an agreement signed
4 dealing with royalty payments entered into either
5 between Godfrey Phillips or Philip Morris, Ltd.,
6 with Lorillard on the subject of sales by the
7 Australian subsidiary of Philip Morris of Kent
8 menthol?

9 A. I don't remember.

10 Q. I'd like to delve with you, if I may,
11 into the history of the marketing of Kent in
12 Australia. First of all, do you have any present
13 knowledge as to the success or lack thereof of the
14 marketing of Kent products by Philip Morris's
15 Australian subsidiary during the decade of the '70's
16 in Australia?

17 A. I'm sorry, would you repeat that
18 question.

19 (Record read.)

20 A. During the first part of that decade.

21 Q. Would you describe, as best you can,
22 the nature of the Australian market in terms of
23 the existence of line extensions of parent brands
24 in the mild area, low tar and nicotine products?
25 How was the market structured?

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2 A. Insofar as line extensions in the mild
3 area?

4 Q. That's right.

5 MR. GREENBAUM: You're talking about
6 Australia now?

7 MR. COHEN: Yes, these questions are
8 directed only to the Australian market.

9 A. My knowledge is limited. It's that
10 there was a developing segment in the light area,
11 the mild area taking place in Australia in the
12 middle part of the decade.

13 Q. Is it fair to state that mild brands
14 may have been introduced into the Australian
15 market around 1973 or so?

16 A. To my recollection, that time frame
17 would be.

18 Q. Were they generally line extensions
19 from existing parent brands?

20 A. It could have been new brands and line
21 extensions. I'm not expert in that market.

22 Q. How would you define the line extension?

23 A. As a product that would be presented in
24 somewhat similar fashion to its parents in terms
25 of packaging and in terms of product.

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Q. Would it have the same brand name?

A. In most instances, yes.

Q. Would an example of a line extension be, for example, Marlboro Light?

A. Yes.

Q. Would the parent be Marlboro?

A. Yes.

Q. And Kent menthol, with the parent being Kent?

A. Yes.

Q. Were there essentially two kinds of cigarettes sold in the Australian market, ones utilizing blended tobacco and the other Virginia?

A. Yes.

Q. What is the difference?

A. Virginia cigarettes do not constitute burly and Oriental tobaccos. Blended cigarettes do.

Q. Was the bulk of the Australian market during the 1970's a Virginia market?

A. No, I believe it was a blended market.

MR. COHEN: Off the record.

(Discussion off the record.)

MR. COHEN: Would you mark the

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1 following documents, please: Defendant's Orcutt
2 Exhibit 32, a document entitled "1975 marketing
3 plans for Kent"; as Defendant's Orcutt Exhibit 33,
4 a memorandum dated December 8, 1975, from Hurley
5 to Orcutt; Defendant's Orcutt Exhibit 34, a
6 document entitled "Kent - current position" dated
7 April 23, 1976; Defendant's Orcutt Exhibit 35 a
8 document entitled "Kent - Australia 1976/77
9 marketing plan."
10

11 (Whereupon, documents above referred to
12 were marked as Defendant's Orcutt Exhibits
13 32 through 35 for identification, as of this
14 date.)

15 Q. Mr. Orcutt, referring to Defendant's
16 Exhibit 32 which is entitled "1975 marketing plans
17 for Kent" and 35, which is entitled "Kent
18 Australia 1976/77 marketing plans," are these
19 copies of documents which were received by
20 Lorillard from Philip Morris's Australian
21 subsidiary?

22 A. I don't see any receipt mark on it, but
23 they appear to be.

24 Q. Did Lorillard at the time request
25 marketing plans from licensees generally with

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Respect to future years?

A. Yes.

Q. What purpose was served by that insofar as Lorillard was concerned?

A. To develop a better understanding between the licensor and the licensee as to the support that will be given to the brand and to mutually plan the future of the next year's support for the brand.

Q. What departments within your operation during the period of time 1970 through '77 were concerned with the review of marketing plans presented by the Australian licensee?

A. Primary responsibility would be at the director of operations, far East level.

Q. Who would that have been during this period of time?

A. Paul Clark.

Q. Internally in Lorillard, Clark, I take it, would review these documents. Would he then give the benefit of his review to the New York headquarters operation which you conducted?

A. Yes.

Q. Would there have been instances, for

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example, where Mr. Clark might have disagreed with proposals set forth in a marketing plan presented by the Philip Morris subsidiary in Australia?

A. There could have been.

Q. Do you have any present recollection of any conversations which you might have had with Mr. Clark with respect to marketing plans proposed for future years by Philip Morris's Australian subsidiary?

A. No absolute recollection.

MR. GOLDBRENNER: Hold on a minute, Dick. I don't understand the question. Could you read it again, please.

Q. Did you and Mr. Clark have occasion from time to time to talk about the marketing plans put forward by the Australian subsidiary of Philip Morris?

A. Discussions would be more in line with what was happening in the direction that the brand was going rather than a review of the specific written document.

Q. Do you have any present recollection of how the brand was going in Australia during this period of time? Were its sales static? Was it

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market share moving up or down?

A. There was some loss of business, loss of sales.

Q. Was that loss attributable to the price increases in 1975 in the market there?

A. I believe that was a contributing factor.

Q. Were you concerned about the volume of sales?

A. Wherever there is a loss there would be concern.

Q. Do you have any present recollection of discussions which you might have had with Mr. Clark with respect to suggestions you felt he ought to make to the Philip Morris subsidiary in Australia?

A. Yes, there would be -- there would have been discussions as to the development of the market as it pertained to Kent and a review of the sales situation; and with that, undoubtedly some discussion as to what actions could or should be taken to correct it.

Q. At the present time do you recall the general problems that Kent had been having in

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Australia, what they were?

A. Pricing, increase in pricing, and there was a perception problem.

Q. What does that mean?

A. The consumer, the image of the brand with the consumer was not as clear as our licensee would have liked it, and that's the input that we received from our licensee.

MR. GREENBAUM: Off the record.

(Discussion off the record.)

Q. I'd like to refer you to Defendant's Exhibit 33 and in particular page 3, the paragraph entitled third. When you speak of the image of the brand, are you referring to the fact that it had positioned itself as a healthy cigarette?

MR. GOLDBRENNER: This is not a letter from Mr. Orcutt but to him.

MR. COHEN: Yes, I understand.

A. Kent's worldwide image was of a healthy cigarette.

Q. There is language in this letter from Mr. Hurley to you to the effect that "this image was established in the early days of its launch through publicity on the original Reader's Digest

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2 report." Is that the image you're referring to, a
3 health-oriented image?

4 A. Yes.

5 Q. Was that the image the brands possessed
6 in the United States at this time?

7 A. Yes.

8 Q. In the letter from Mr. Hurley there is
9 reference to "the image having been established in
10 the early days of its launch through publicity on
11 the 'original Reader's Digest' report." What is
12 that?

13 A. That was a most favorable article that
14 was published in the late '50's in the Reader's
15 Digest that in effect said that Kent was probably
16 the most healthy cigarette to smoke available on
17 the market.

18 Q. There is also a reference in that same
19 paragraph, paragraph --

20 MR. GOLDBRENNER: I think I'd like to
21 talk with you and Arthur for a minute outside..

22 (Recess taken.)

23 Q. At this time in Australia in the
24 mid-1970's, the companies were not allowed, were
25 they, to advertise the numbers, the degree of tar

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and nicotine in the marketplace, were they?

A. There were advertising restrictions, yes. The absolute nature of those restrictions I could not recite, but there were restrictions.

Q. But it's not your understanding that they could have trumpeted the degree of tar in advertisements, 9 milligrams or 4 milligrams?

A. No.

Q. At the bottom of page 3 of Exhibit 33 there is a paragraph which commences under the heading "name strategy," and in subparagraph A which continues onto page 4 there is a statement that the universally-accepted name Pan Europe signifies the low tar and nicotine category is mild, and that in the United States lights is the word that signifies the category. Was that your understanding, sir?

A. No.

Q. So that the statement then by Mr. Hurley you would regard as inaccurate?

A. I would regard it as a way of forming it. I believe it's interchangeable that lights and mild are not necessarily as definitively descriptive as Mr. Hurley sets out here.

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2 Q. Were studies undertaken by Lorillard,
3 not necessarily with reference to the Australian
4 market, but worldwide, as to name strategy, the
5 production and selling and marketing of a low tar
6 cigarette?

7 A. Not specific studies, no, sir.

8 MR. GREENBAUM: Mr. Cohen, we seem to
9 be getting into a new area now. Could we break at
10 this point.

11 MR. COHEN: Why don't we break.

12 (Luncheon recess: 12:20 p.m.)
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AFTERNOON SESSION

1:40 p.m.

R I C H A R D H. O R C U T T, having been
previously sworn, resumed the stand and
testified further as follows:

EXAMINATION (cont'd.)

BY MR. COHEN:

Q. Mr. Orcutt, would you take a look at
Defendant's 33, which is the letter to you from
Mr. Hurley of December 8, 1975. What was Mr.
Hurley's position in Lorillard at that time?

A. He was director of new products.

Q. Do you recall what his background was?

A. Yes, he had a fairly extensive
background in advertising and marketing.

Q. Was that reference to new products new
products in the international area?

A. His total responsibility was in the
international area.

Q. Thank you.

Page 2 of this letter makes reference
to Project Castle which is described as covering
The testing and launch of a line extension of Kent
in various countries. What department or

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1
2 individuals in the Lorillard organization were
3 concerned with Project Castle?

4 A. The European region personnel and those
5 individuals in the New York office who
6 participated in the development of new plans, new
7 projects, new products.

8 Q. Were you, yourself, involved in overall
9 supervision of Project Castle?

10 A. No.

11 Q. What individuals by name had major
12 responsibility for that project?

13 A. In Europe our director of European
14 operations, and in the New York office John Howard.

15 Q. Does Mr. Hurley correctly describe
16 Project Castle on page 2 of his letter?

17 A. Yes, it would.

18 Q. On page 3 there is a reference to "overall
19 objective" which is described as "to produce a
20 Kent product that will be perceived by health
21 conscious competitive consumers as being in the
22 acceptable range of mild products." Does this
23 reference to overall objective refer to Project
24 Castle?

25 A. Yes.

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Q. At the bottom of that page reference is made to a category entitled "name strategy," and we spoke of this earlier before the break. Again, this name strategy has reference to Project Castle?

A. Yes.

Q. On the beginning of page 4 under the subheading b it states, "in the United States Lights is the word that signifies the category." My question is would Golden Lights as a brand have been one of the potential brands to fit within the objectives of Project Castle? Would the managers of that project have been considering utilization of Golden Lights as part of the project?

A. Golden Lights was the primary entry name into that project.

Q. What other names were considered?

A. Special Mild.

Q. Had the possibility of Special Mild been considered as an overall brand for worldwide use by Lorillard in the past?

A. Not to my recollection.

MR. COHEN: May I have a document entitled "Project Recovery," dated July 16, 1975, marked as Defendant's Orcutt Exhibit 36 for

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1 identification.

2
3 (Whereupon, document above referred to
4 was marked as Defendant's Orcutt Exhibit 36
5 for identification, as of this date.)

6 Q. Mr. Orcutt, Exhibit 36, entitled
7 "Project Recovery" has been handed to you. Could
8 you describe that document and tell us what it is,
9 what it purports to be?

10 A. A paper developed by John Hurley
11 introducing certain statements with reference to
12 Kent's performance in Europe and to actions that
13 he would recommend we consider to correct a
14 stagnation of Kent's growth position.

15 Q. At the bottom of the first page, the
16 title page, there is a handwritten notation which
17 states, "review with E. judge decision scrap Delta,
18 go with Kent mild." Could you tell us what that
19 refers to?

20 A. Yes. Delta was the code name for a
21 Review of the feasibility to introduce True in
22 Europe.

23 Q. The question of the feasibility of
24 marketing True in Europe was a question which was
25 studied by what organization or department or

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individuals at headquarters?

A. Similar to those that studied Project Castle.

Q. Again, in the United States principal responsibility would have been whose?

A. John Howard.

Q. Who was E. Judge?

A. C. Judge.

Q. C. Judge.

A. He was and is the president of Lorillard.

Q. That's Curt Judge?

A. Curt Judge.

Q. And the notation "decision scrap Delta, go with Kent Mild" would have been the decision of what organization, department or individual?

A. The decision of the group, the senior people within that group, the director of Europe, John Hurley, myself.

Q. What were the factors which led you to a determination to scrap Delta and go with Kent Mild?

A. It was our judgment that a line extension of Kent would be more appropriate at

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that time than the launch of True.

Q. Was Kent at that time your principal brand overseas, had the greatest degree of recognition among consumers throughout Europe?

A. Yes.

Q. On page 4 of the Project Recovery report by Mr. Hurley, there is a statement under the subheading 4, "launch True as a followup to Kent Mild." Was that statement adopted by the group? In other words, at the time the decision was made to scrap Delta and go with Kent Mild, was the recommendation of Mr. Hurley that True would be launched as a followup to Kent Mild adopted at that time by Lorillard?

A. No, not as a definitive position.

Q. I'm not quite sure I know what you mean by as a definitive decision. Was it adopted as an interim goal?

A. No. Forgive the vernacular, it was put on the back burner.

Q. That says it.

Going back to Exhibit 33 which is the memorandum from Mr. Hurley to yourself, dated December 8, 1975, and directing your attention to

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page 4, there is a notation under the heading "market developments" that Project Castle is currently in test market in the United States. Does that have reference to the test marketing of Kent Golden Lights in Maine?

A. Yes, it does.

Q. The statement in that same sentence that "Project Castle was launched nationally in Belgium in October of 1975," did that have reference to the launch in Belgium of Kent Special Mild?

A. Yes.

Q. It's fair to state that Project Castle concerned itself with at the very least, Kent Special Mild and Kent Golden Lights depending on the location, the geographic area?

A. Yes.

Q. Were there any other brands which were marketed under the general direction of Project Castle?

A. No.

Q. At this time, December of 1975 when Mr. Hurley was writing you, in Australia basically the competition was marketing cigarettes in the low

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tar area under a designation mild in one form or another, were they not?

A. Lights and mild.

Q. What competitor was using Lights in Australia?

A. To my knowledge, Marlboro Lights was in Australia.

Q. Other than Marlboro Lights was there any other?

A. I don't know of any specifically.

Q. In the complaints in this case in paragraph 6 there is a statement that "In 1975 the Lorillard division of Loews Theatres started to market on a limited basis in the United States a line extension of its Kent cigarettes under the trademark Kent Golden Lights for a low tar and nicotine cigarette. It was advertised and sold on a nationwide basis commencing in early 1976." Is that an accurate statement?

A. Yes, it is.

Q. Are you generally familiar with the United States cigarette industry in terms of its history?

A. Yes.

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2 Q. I take it you're generally familiar
3 with United States cigarette marketing practices?

4 A. Yes.

5 Q. You testified earlier, I believe, that
6 you spent some time in the domestic market in the
7 sales force end of the business?

8 A. Yes.

9 Q. Do you know how long Lorillard has sold
10 cigarettes in the United States?

11 A. In excess of 50 years, to my knowledge.

12 Q. When did Lorillard first introduce Kent
13 in the United States?

14 A. In 1952.

15 Q. How was the cigarette positioned at
16 that time?

17 A. It was a premium price filter product.

18 Q. I take it positioning means placement
19 in the market spectrum, the attributes that you
20 use to publicize a product to distinguish it from
21 the other competitive products?

22 A. Yes.

23 Q. By 1975 how was Kent positioned?

24 A. In the United States?

25 Q. In the United States.

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1
2 A. It was positioned as a brand with good
3 taste.

4 Q. Was it what's commonly known as a
5 full-flavor cigarette?

6 A. No, no. It was positioned as a lower
7 numbers product that offered good taste.

8 Q. What do you describe as a "full-flavor"
9 cigarette?

10 A. Examples in the United States?

11 Q. Yes.

12 A. Winston and Marlboro and Old Gold.
13 That is full-flavor filter cigarettes.

14 Q. Was Kent regarded by Lorillard's
15 management as a low tar cigarette in the 1970
16 period?

17 A. Yes.

18 Q. When was Kent Golden Lights introduced?

19 A. In the United States?

20 Q. Yes.

21 A. Test market?

22 Q. Yes, test market.

23 A. October-November 1975.

24 Q. How was the determination made
25 internally at Lorillard to come out with Kent

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Golden Lights?

A. I was not a party to those determinations.

Q. Do you know when they were made by year, for example?

A. It was made in 1975.

Q. When you say you weren't a party to that decision, does that mean --

A. To those determinations.

Q. To those determinations.

A. Or that decision.

Q. What was your responsibility at that time?

A. Vice president, managing director, international.

Q. At what stage in the history of the marketing and development of Kent Golden Lights did you first become involved in decision-making?

A. I became aware of the plans of the domestic organization to line extend Kent to Kent Golden Lights, and with that awareness, international then started to review the feasibility and possibility of utilizing that product in extension internationally. So my

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2 involvement and thought process with that brand
3 would start in 1975 with the knowledge --

4 Q. Do you recall approximately the month
5 that international might have started to concern
6 themselves?

7 A. Mid-'75.

8 Q. Are you aware that initially there was
9 a plan to test market Kent Golden Lights in
10 Arizona and in certain counties of New York?

11 A. Aware, no.

12 MR. COHEN: May I have this document
13 marked for identification as Defendant's Orcutt
14 Exhibit 37 for identification.

15 (Whereupon, document above referred to
16 was marked as Defendant's Orcutt Exhibit 37
17 for identification, as of this date.)

18 Q. I'd like to show you Defendant's
19 Exhibit 37. Would you look at that and tell me,
20 if you can, what that document is and what it
21 might have been used for as a matter of company
22 policy. How did they use these kinds of documents?

23 A. This is a notice to Lorillard's direct
24 purchasing customers that we are going to
25 introduce a new product, the terms of that product

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and various other details.

Q. This is mailed out, I take it, in advance of an introduction?

A. Yes, it is.

Q. To alert the retailers --

A. To alert our customers.

Q. To alert your customers.

A. So they can be prepared when our people make a call on them to submit an order. It's to give them advanced notice.

Q. This would be followed up by drummers with point of sale material offer?

A. No, not this notice. It would be followed up by a sales representative to call on each customer to tell them more specifically what the product is, to show him the product and to solicit an order and his cooperation in the distribution of this product.

Q. If the retailer were convinced or the wholesaler were convinced to stock the product at that point would your sales representatives go to retailers in the immediate area of your customer in order to distribute point of sale?

A. Yes, they would.

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2 Q. From your experience at the time when
3 you were in the echelons of Lorillard's U.S. sales
4 force, is it customary for yourself as Lorillard
5 and competitors to obtain copies of these
6 circulars to give information back to their
7 respective managements?

8 A. Yes.

9 Q. This circular is dated October 3, 1975.
10 Do you have any understanding of what common
11 practice would be within Lorillard at that time as
12 to how long after the date or prior to the date of
13 the circular that these circulars would reach your
14 customers?

15 A. Approximately two weeks in advance of
16 the delivery of the product.

17 MR. GOLDBRENNER: Could you read back
18 the question and the answer, please.

19 (Record read.)

20 MR. COHEN: Let me rephrase that a
21 little bit.

22 Q. The circular is dated October 3. Can
23 you tell approximately what date these circulars
24 would have been in the hands of your customers?

25 A. Given the vagaries of the U.S. mail, we

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would hope in three or four days.

Q. In the 1970's in the United States the industry as a whole was developing line extensions and new products with reduced tar and nicotine content, was it not?

A. Yes.

Q. You stated that initially you would not have been aware of the development of Kent Golden Lights internally in Lorillard, that was the determination of other departments within the domestic operation; is that true?

A. I believe I said earlier that I was not aware of this memo at that time, of this circular. But I was aware that there were determinations for a new product, but not the details that were being studied, discussed and decided upon.

Q. At the executive level then you would have been aware of the fact that Lorillard was contemplating a new low tar and nicotine line extension of Kent?

A. Yes.

Q. Had there been any comments among your peers at the directorial level in Lorillard about the use of Lights as part of the product

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1 designation?

2 A. My peers internationally?

3 Q. Or domestically, that you would have
4 been privy to.

5 A. I do not recall any discussions in that
6 context with domestic counterparts. And
7 internationally, we were cognizant of the
8 potential value of a Lights line extension.

9 Q. Were executives at Lorillard and
10 yourself, to your knowledge, aware of litigation
11 going on between Philip Morris and Reynolds over
12 Marlboro Lights versus Winston Lights?

13 A. I cannot answer for any associates. I
14 may have had some passing knowledge, but I do not
15 recall any great specificity.

16 Q. At the time it was determined by
17 Lorillard to market Kent Golden Lights, were there
18 any other light brands already in the U.S. market?

19 A. Yes.

20 Q. Marlboro Lights certainly and Winston?

21 A. Yes.

22 Q. Marlboro Lights was the first brands to
23 be designated Lights in the market at that time,
24 was it not?
25

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A. To my knowledge.

Q. Would you have been aware at the point in time when Lorillard first became aware of Marlboro Lights?

A. No.

Q. Does Lorillard in general in its domestic operations have a department or individual concerned with following the introduction of new brands by competitors?

A. Yes, we pursued that information.

Q. You have a room where you tack up the ads?

A. In brand reviews, at product reviews competitive advertising is from time to time included.

Q. As a practical matter all the cigarette companies follow competitive activity pretty closely, don't they?

A. Yes.

Q. I believe you testified in the Australian action that you had no responsibility for the domestic operations of Lorillard during the 1970's.

A. No, during the period 1970 through 1977.

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1 Q. I'm sorry, that's quite true.

2 But you were aware of the general
3 nature of the test marketing of Kent's Golden
4 Lights in Maine?
5

6 A. Yes.

7 Q. There were about 2,000 retailers in
8 Maine I believe you testified, that would have
9 been given point of sale material such as placards
10 or cartons?

11 A. Yes.

12 Q. And the name Kent Golden Lights would
13 have been prominent in those retail shops?

14 A. Yes.

15 Q. If the test market were successful
16 Lorillard would have moved into the Northeastern
17 Part of the United States, would they not? That
18 was your plan, wasn't it?

19 A. Yes.

20 Q. I believe you testified in Australia
21 that the first of November 1975 would have been
22 the earliest date that test marketing in Maine
23 could have commenced?

24 A. That was my understanding at the time I
25 testified.

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Q. Has it changed?

A. No, insofar as I looked at the circular shortly thereafter, saw the specific dates and have since not memorized them. But it was in that time frame.

Q. The circular I showed you had reference to test marketing in New York and Arizona.

A. That's correct.

Q. Do you recall at what point in time you personally became aware of the proposed use by Lorillard of a brand to be called Kent Golden Lights?

A. My response would be the same as previously, in the mid-1975 area.

Q. At what stage or what time did you learn that Lorillard intended to go nationally with Kent Golden Lights?

A. I don't have specific recollection of that. It would be late 1975. Late 1975.

Q. Could you put a closer reference in time to that by considering the launch in Maine. How long after the test marketing in Maine or was it during the test marketing in Maine that you became aware that Lorillard was going to go

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1 nationally with Kent Golden Lights?

2 A. No, during the test in Maine I became
3 aware that every indication was of an absolute
4 success.
5

6 Q. Is there a procedure within Lorillard
7 either by department or by organization or
8 individual whereby a formal decision is made on
9 whether to go nationally on a brand?

10 A. Yes.

11 Q. What organization would make that
12 decision or what department would make that
13 decision?

14 A. The marketing department would make
15 that recommendation to senior management of
16 Lorillard.

17 Q. To the senior management?

18 A. To the senior management of Lorillard.

19 Q. At this point in time were you a member
20 of senior management?

21 A. Not in the domestic operation.

22 Q. The international operation would not
23 be involved in a determination to go nationally in
24 the United States with a brand?

25 A. No.

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2 Q. At what point in time was Kent Golden
3 Lights available on a large scale within the
4 United States?

5 A. I can't answer that question except by
6 secondary reference.

7 Q. That would be?

8 A. I believe it was early 1976.

9 Q. What would the secondary reference be
10 to which you referred?

11 A. My discussion with counterparts that
12 the product was an absolute success, and it then
13 became a question of manufacturing potential and
14 manufacturing constraints to take it out, to
15 broaden its base.

16 Q. When you were in the sales department
17 at any point were you involved in any
18 determinations as to whether or not a product
19 would go nationally in the United States?

20 A. Prior to transfer to international?

21 Q. That's correct.

22 A. No.

23 Q. During the period of time when you were
24 in the sales force were there instances in which a
25 product was test marketed and then later went

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1
2 national?

3 A. Yes.

4 Q. What products would that have been?

5 A. York Imperial size, a cigarette brand.

6 Q. Can you think of any others?

7 A. Not off the top of my head.

8 Q. Do you recall how long after test
9 market concluded that York went national?

10 A. No, not off the top of my head.

11 Q. Are you somewhat familiar with
12 trademark registration procedures in the United
13 States?

14 A. At best somewhat.

15 Q. What about do you have any familiarity
16 with Lorillard practices with respect to trademark
17 registration in the United States, how Lorillard
18 operates?

19 A. It would be on the basis of a
20 determination that a trademark has value and then
21 to proceed to take whatever steps are required to
22 protect that value through registration.

23 Q. Who makes that initial determination
24 that a trademark has value and ought to be
25 protected?

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2 A. The recommendation for trademarks could
3 emanate from internal, from sales or marketing
4 departments. They might emanate internally from
5 our agencies and the final recommendations would
6 be made to senior management who would then
7 authorize proceeding to trademark protection.

8 Q. When you refer to senior management, I
9 take it you're referring to senior management
10 domestically?

11 A. Yes, sir.

12 Q. In the international area is there a
13 counterpart method of procedure for trademark
14 registration?

15 A. Yes.

16 Q. Basically it's the same, just a
17 different track for international?

18 A. Basically, yes.

19 Q. Who in international during the period
20 of the 1970's, prior to the takeover of the
21 international business by the BAT organization,
22 would have been the individuals involved in making
23 these determinations as to registration of marks?

24 A. The input could come from the same
25 sources that I mentioned. The recommendation

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2 would be made to myself and then the final
3 determination could either rest with my office or
4 might then be reviewed with my superior.

5 Q. Who would that have been?

6 A. The president.

7 Q. Mr. Judge?

8 A. Mr. Judge.

9 Q. Was he also the last word with respect
10 to domestic registration?

11 A. He was part of senior management.

12 Q. In your personal determination as to
13 what brands to register worldwide, what other
14 factors would you look to before making a
15 determination? I think, for example, you
16 testified earlier that Kent was registered in over
17 150 countries. You mentioned a few other brands
18 as well. I think you mentioned Ol' Gold had
19 substantial registration in various countries.

20 A. I would have to go back to registration.

21 MR. GREENBAUM: I think you've
22 mischaracterized the testimony. My recollection
23 is he talked about where sales were and didn't
24 refer to registrations.

25 MR. COHEN: Then I misunderstood too,

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and we might as well clear it up.

Q. Lorillard has several thousand registrations, does it not, abroad, two or 3,000?

A. Yes.

Q. In how many countries by major brand, roughly, would you say they are? Take Kent, for example.

A. I would say Kent was probably registered in excess of 150 countries or territories.

Q. What other significant brands are registered in many countries abroad?

A. True, Old Gold, Newport, Beechnut; one or two of our little cigar brands I believe, between the acts.

Q. To what extent, if any, was the determination to register any of those brands abroad made by yourself or did you have an input?

A. The majority of those brands were introduced in the United States, and the trademark or registration work was done prior to my involvement with international.

Q. I'm only talking now about registrations abroad.

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A. As I am. Those registrations existed when I was transferred to international.

Q. These were registrations abroad, not domestic registrations?

A. Abroad.

Q. From and after your assumption of duties in the executive level in the international area for Lorillard, did you have in fact occasion to consider the registerability of brands of Lorillard abroad?

A. Yes.

Q. Did you authorize registration of any brands abroad?

A. Yes.

Q. What were they?

A. Maverick.

Q. Was that a cigarette brand?

A. That was a cigarette brand. L.T. Brown. Forgive me, I'm not stalling -- I'm stalling for time to think.

Q. That's all right.

A. Max, Zack.

Q. What were the factors going into your determination to authorize the registerability of

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those brands abroad?

A. The intended use in the United States and the hoped for intended use internationally.

Q. Were the decisions which were made by you to authorize the registration of those brands abroad made following the introduction of those brands within the United States?

A. I cannot recall in each specific instance whether it was premature, parallel or following.

Q. Were those brands ultimately successful within the United States?

A. There is only one remaining that's in the United States.

Q. That would be --

A. That is Max, and that is not a major brand.

Q. Of the brands that you've testified that you authorized registration abroad for, in how many countries were these brands authorized to be registered? I don't want to tie you down to a specific number, but I'd like to get some idea of the maximum number of countries.

A. We operate with an A list of countries;

A. being primary. I believe we would be talking between 25 and 35 countries.

Q. In this A list?

A. Yes.

Q. What are the countries in that list?

A. Some of the countries, England, Switzerland, Belgium, Saudi Arabia, Luxembourg, Spain, Holland, Germany, Japan, Hong Kong, Columbia, Argentina, Brazil, Canada, France.

Q. During the period of your tenure in the international area was any consideration given to the registerability abroad of --

MR. GREENBAUM: When you say registerability do you mean registration?

MR. COHEN: Excuse me, registration. Off the record.

(Discussion off the record.)

Q. -- the registration abroad of Kent Special Mild?

A. I'm sorry, would you repeat the question.

(Record read.)

A. Yes.

Q. Who was involved in the consideration

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as to whether or not to register that brand?

A. The senior people in the European regional office and the marketing people in the New York office.

Q. In what area in the New York office?

A. International.

Q. The international area?

A. International.

Q. Are determinations made from time to time by Lorillard senior management irrespective of the international or U.S. divisions, as to the necessity of registering a brand worldwide? In other words, is there an echelon above divisional heads such as yourself or your counterpart in the domestic operations who consider the worldwide potential of a brand?

A. No, it would be encompassed by the senior management of the Lorillard division.

Q. Who would they be?

A. Ultimately, the ultimate individual if it came to one individual making a determination would be the president of the division.

Q. That would be Mr. Judge?

A. Mr. Judge.

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2 Q. Who would he consult? Who did he
3 consult on matters which were not endemic to one
4 division?

5 A. The respective division heads or
6 department heads and legal counsel.

7 Q. With respect to Kent was there ever a
8 determination made following a conference of
9 divisional heads with Mr. Judge with respect to
10 the registration worldwide of any of the Kent
11 marks or line extensions of the Kent marks?

12 A. No.

13 MR. COHEN: Would you please mark a
14 document entitled "Schedule A" which consists of
15 four pages as Defendant's Orcutt Exhibit 38 for
16 identification.

17 (Whereupon, document above referred to
18 was marked as Defendant's Orcutt Exhibit 38
19 for identification, as of this date.)

20 Q. I'd like to refer you to the document
21 marked Defendant's Exhibit 38. This is a schedule,
22 is it not, which had been annexed to the asset
23 purchase agreement whereby BAT purchased the
24 international business of Lorillard?

25 A. I can accept it's a schedule, but I'm

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not privy to the asset purchase agreement.

Q. Were you involved at all in the negotiations leading to the acquisition by BAT of Lorillard's international operation?

A. No.

Q. Referring to Schedule A-1 on this document, referring to Schedule A, I'd like you to examine the brands listed on A-1 and then those listed on A-2. Is it fair to state that the brands listed on page A-1 were the major brands of Lorillard in the international area?

A. They were the brands that had the greatest sale.

Q. Are all the brands listed on page A-1 registered abroad?

A. To my knowledge they are.

Q. Of the brands listed on page A-1, is it fair to state that the most significant in terms of sales would be the first, Kent?

A. I can't draw significance between where it's positioned on the page, but it was our number 1 seller.

Q. Would that also be true for the remaining brands listed here, you could not draw

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any particular significance from the order in which they are placed?

A. I can't comment on the typing, but Kent was the primary product in international sales.

Q. Would it be fair to state that as of the time of the acquisition Newport internationally out sold Old Gold?

A. I believe it did.

Q. Would it be fair to state that at that time Old Gold out sold True?

A. Toss a coin.

Q. Of the brands listed on page A-1, would it be fair to state that Lorillard sold least?

A. Well, Lorillard was not a product.

Q. Yes, of course.

With respect to the brands listed on schedule A-2 on page 1, are those marks registered abroad or were they registered abroad at that time, the time of the acquisition by Lorillard?

A. To my knowledge, yes.

Q. Turning to page 2 of Schedule A-2, were the brands listed on that page all registered in countries abroad, certain countries abroad?

A. Those trademarks were to my knowledge,

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but they don't represent brands.

Q. You're right. With respect to the trademarks listed on page 3 of Schedule A-2, were these trademarks registered in various countries abroad?

A. To my knowledge, yes.

MR. GOLDBRENNER: The reference to trademarks refers back to all pages of this document.

MR. COHEN: Yes.

Q. Earlier I asked you some questions about determinations being made with respect to whether or not to register abroad the mark for Kent Special Mild. I don't think I asked you how those determinations turned out. Was a decision made to register Kent Special Mild abroad?

A. Yes, to protect our positioning in Europe when the product was launched.

Q. Do you recall how many countries there were in which that mark would register?

A. No, I do not.

Q. Do you recall whether there were several or few?

A. I really do not have a recollection of

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a report back on what the ultimate results were.

Q. Was a meeting also held within your division or between your division and Mr. Judge with respect to registering abroad the mark for Kent Golden Lights?

A. I don't recall a specific meeting, but there was a determination to protect that trademark.

Q. Do you recall who participated in that decision?

A. Myself, Mr. Judge, I'm sure, by way of being aware that it was going to take place and various other people in the international division.

Q. Could you tell us who they might have been?

A. Jack Wisner, probably; John Hurley.

Q. What was his title at the time?

A. Director of administrative services. John Hurley, John Roberts.

Q. His position at the time?

A. John Roberts?

Q. Yes.

A. Director of manufacturing, international.

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2 Q. When was this determination made, do
3 you recall?

4 A. A specific date, no.

5 Q. Would there be any records which
6 Lorillard might have which could refresh your
7 recollection?

8 A. I don't believe there -- I don't
9 believe there were written minutes. I think it
10 was an agreement and an understanding verbal to do
11 it.

12 Q. Was that decision implemented prior to
13 the takeover by BAT?

14 A. To my knowledge, yes.

15 Q. Where was it implemented, what
16 countries?

17 A. I cannot recount the specific countries
18 that it was implemented.

19 Q. Were there many countries?

20 A. There was a -- the request encompassed
21 the value of Kent Golden Lights internationally on
22 a global basis, and that was the instructions
23 given or that was the position.

24 Q. I take it then that there were
25 applications for registration made by Lorillard

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abroad?

A. I didn't see any physical applications that was not my responsibility, so I can't tell you there were actual physical applications made.

Q. Your testimony is then that authorization came down from on high to do it but you don't have any physical evidence that it was in fact done?

A. There was an agreement to do it.

Q. Could you place the time of this decision with reference to the test market of Kent Golden Lights in Maine?

A. Those discussions or that discussion or determination was probably made within that time frame that we were discussing Kent Golden Lights worldwide value, that is summer or towards the end of '75 into '76.

Q. In the past when determinations would be made by international or domestic to register a brand by people at the level that you were on, were there instances where the decisions which were authorizing registration were not carried out by subordinates?

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A. Not where instructions were not carried

out, to my knowledge.

Q. So as far as you know today, registrations or applications for registrations of Kent Golden Lights abroad were made in various countries?

A. No, I don't believe I could say that. I didn't see any physical evidence of it. So I can't say that they were made.

Q. They were, however, authorized to be made, applications for registration abroad by you?

A. Yes, there was an agreement that it was a valuable trademark, and we should do what is required.

Q. Following the takeover by BAT of the international division --

MR. GREENBAUM: Excuse me, are you going on a new topic?

MR. COHEN: No.

MR. GREENBAUM: When you get to a new topic let me know.

Q. Was a request made of your division to put together the books and records which pertained to the operation of your business for transfer to the new owners?

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2 A. Yes.

3 Q. Were trademark registrations and
4 applications for trademark registrations abroad
5 turned over by your division to BAT?

6 A. I would assume they were.

7 Q. Is it your present understanding that
8 all applications for registration abroad of Kent
9 Golden Lights or Golden Lights were turned over by
10 your division to BAT?

11 A. I would assume they would have been.

12 Q. Was your division involved in any
13 assignments of registrations or applications for
14 registration of trademarks to BAT?

15 A. I don't have specific knowledge of that.

16 MR. COHEN: We can do this formally by
17 another document if you feel it's necessary, but
18 we would like a listing of applications for
19 registration of Kent Golden Lights or Golden
20 Lights and the registrations themselves of that
21 mark which were turned over to BAT by Lorillard.

22 MR. GREENBAUM: We will undertake to
23 provide such information.

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24 MR. COHEN: Thank you..

25 MR. GREENBAUM: I have an important

reason for asking when you're finished with this topic let me know.

MR. COHEN: We'll break now.

(Recess taken.)

Q. Does Lorillard still sell Kent Golden Lights in the United States?

A. No.

Q. Is the product essentially the same product now sold under a different name?

A. Yes.

Q. What is the new name?

A. Golden Lights.

Q. When was the change made?

A. In late 1978.

Q. When was the determination to make that change made? When did that determination come?

A. The discussions leading up to that took place the second quarter, April, May, June, July of 1978, in that time period.

Q. What was the basis for the decision to change over?

A. I'm not sure if that isn't protected.

MR. GOLDBRENNER: I will object.
That's a trade secret that we don't want to

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Orcutt.

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disclose.

MR. COHEN: I won't press it.

MR. GOLDBRENNER: If I may ask Mr.

Orcutt a couple of questions with respect to your questions as to the use of Kent Golden Lights.

Mr. Orcutt, when you were asked as to whether or not the name was changed over, was your response with respect to the current predominant use of the trademark Golden Lights and Kent Golden Lights?

THE WITNESS: Yes.

MR. GOLDBRENNER: Do we still use the trademark Kent Golden Lights in association with the product?

THE WITNESS: Yes, in a minor way.

MR. GOLDBRENNER: Thank you.

Q. Is Kent Golden Lights regularly marketed in any city of the United States today?

A. Kent Golden Lights, no, but Golden Lights by Kent is.

Q. You referred earlier to Golden Lights by Kent as a product. I show what we'll have marked Exhibit 39 for identification which is the outside cover of a pack of Golden Lights and I ask

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Orcutt

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you whether or not this document is a copy of the outside pack of the brand you referred to earlier as Golden Lights by Kent?

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 39 for identification, as of this date.)

A. Yes.

MR. GOLDBRENNER: Let the record shows that's the Golden Lights 100's regular variety.

Q. Mr. Orcutt, in November of 1975 you had two meetings, did you not, with Hamilton Hurley of Philip Morris's Australian subsidiary, specifically on November 17 and 18 of 1975?

A. Okay. Yes, I recall the first one but not the second one. I suppose I did.

MR. COHEN: May I have the following marked as Defendant's Orcutt Exhibit 40. It is a document dated November 20, 1975, from D.S. Devitre to the file.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 40 for identification, as of this date.)

Q. Mr. Orcutt, would you read Defendant's Exhibit 40 and tell me whether or not that

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correctly sets forth the substance of the meeting which you had on November 17th, with Mr. Hurley.

MR. GREENBAUM: On your copy at the bottom of page 2, do you have a line that seems to be left out here?

MR. COHEN: It's hard to read. I think what it says is --

MR. GOLDBRENNER: Back to Orcutt on November 18th is the last few words.

MR. COHEN: - I'm afraid this was made from a Xerox.

MR. GREENBAUM: It's not important.

MR. COHEN: I think it probably indicates Hurley will get back to Orcutt on November 18th, because the next page makes reference to their meeting on the 18th.

A. Not in my judgment.

Q. To what extent does it either misstate or fail to state the substantive matters that took place during the conversation?

A. 1. Lorillard was not considering any term if there were to be a renewal of the license agreement beyond seven years; 2. Lorillard was determined it would make an integral part of the

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1 discussions an increase in royalty rate; 3.
2 Lorillard wanted a commitment that Philip Morris
3 Australia Ltd. would continue to support the
4 parent, Kent; 4. Lorillard intended to make the
5 commitment by Philip Morris, Ltd. Australia to
6 manufacture Kent Golden Lights as a quid pro quo
7 for the extension of the license agreement; 5.
8 Lorillard wanted to include in any subsequent
9 license agreement if there were to be one, a
10 clause that would protect us against inflation,
11 devaluation. There would be a cross clause
12 protecting Philip Morris, Ltd. Australia also; 6.
13 Lorillard was going to make any new license
14 agreement -- any new license agreement would
15 contain a provision to increase the royalty
16 payment percentagewise proportionately to an
17 increase in net the ex-factory profit selling
18 price of the license product.
19

20 Those are the discrepancies vis-a-vis
21 the license discussion.

22 The other major discrepancy that I find
23 in this memorandum is that it deals not at all
24 with the discussion of Kent Golden Lights.

25 MR. GOLDBRENNER: Would you read back

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the last number that he gave you as to factory price, please.

(Record read.)

Q. If you will note, page 3 of the Devitre memorandum to the file contains notes on your meeting of the 18th with Mr. Hurley. Would you read page 3, please, and tell me whether or not that page sets out in substance the tenor of your discussions with Mr. Hurley on the 18th of November.

A. It may set out what Ham Hurley said, but it does not set out that I apparently -- it does not correctly state that I apparently accepted these concessions.

Q. I'm sorry, I don't understand that response.

A. Hamilton Hurley may have said these words. There is an indication in here that I accepted those words. The only thing I can say in response is I may have heard them. That in no way should be construed as acceptance.

MR. COHEN: Arthur, today you gave us a document dated December 18, 1975, which purports to be a letter from Mr. Orcutt to Ham Hurley.

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which refers to a position paper attached to it.

We don't have the attachment.

MR. GREENBAUM: Yes, you do. That's the Howley thing that you have been howling about.

MR. COHEN: May I have marked for identification as Defendant's Orcutt Exhibit 41 a letter dated December 18, 1975 from Hurley to Orcutt.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 41 for identification, as of this date.)

Q. Mr. Orcutt, I show you Defendant's Exhibit 41 for identification, and I ask you whether or not that is not a letter which you forwarded on or about that date to Mr. Hurley?

A. Yes.

Q. That letter refers to an enclosure which is a position paper on the proposed line extension for Kent in Australia. I show you Defendant's Exhibit 33 and I ask you if that is not the position paper to which reference is made in your letter of December 18th?

A. Yes.

Q. This letter of --

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MR. GOLDBRENNER: Would you give us a chance to read it, please.

MR. COHEN: Sure.

Q. This letter was written, was it not, as a followup to your meetings of November 17 and 18, 1975, with Mr. Hurley?

A. Yes.

Q. And it purported to set forth Lorillard's position which I gather you had expressed in those meetings to Mr. Hurley on the rollover, the terms of a rollover?

A. Yes. Although rollover is not technically correct.

Q. An extension of a new license agreement?

A. Not to split hair, nor an extension. A new license agreement because there would be some significant changes. It was not in my mind that we were executing an automatic rollover, that we were entering a new ballgame.

Q. In any event, the letter of December 18 was your opportunity to set forth the terms under which you wanted the new ballgame to be played?

A. Yes.

Q. It's clear, is it not, from the letter

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2 which accompanied your letter to Mr. Hurley, the
3 position statement of Mr. Howley, that as far as
4 Mr. Howley was concerned he wasn't sure whether
5 the name of the new product in Australia was to be
6 Special Mild or Golden Lights?

7 A. That's correct.

8 Q. When you testified a few moments ago a
9 quid pro quo for a new license agreement would be
10 the marketing of Kent Golden Lights in Australia,
11 is it fair to state that at least on December 18
12 when you sent this letter out with your
13 accompanying Howley position paper, the quid pro
14 quo was essentially the marketing of a new low tar
15 cigarette which could conceivably have been
16 Special Mild or could have been Kent Golden Lights
17 in Australia?

18 A. Not in my mind.

19 Q. When you had had your discussion with
20 Mr. Hurley had you told him in no uncertain terms
21 that the product in Australia must be designated
22 Kent Golden Lights?

23 A. No, it would not be fair to say that.
24 I told him in no uncertain terms, I told him very
25 emphatically what was happening at this very early

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stage with Kent Golden Lights in the United States, that based on that and our judgment, that Lorillard International would undertake a commitment to maximize on a worldwide basis what appeared to be a very successful product.

Q. Did you tell him in words or substance that insofar as Philip Morris Australia was concerned it would have no input in the name of the new line extension?

A. No.

Q. In other words, as far as Hurley knew when he left your offices in New York, his marketing people could still conduct a study to determine whether or not Special Mild or Golden Lights would be better in Australia?

MR. GOLDBRENNER: I object to what Hurley knew in his mind when he left. Could you rephrase that.

MR. COHEN: Surely.

Q. Let me put it this way. In the course of your discussion with Mr. Hurley, and I realize we are talking about 1975 and we are in 1981, and I take it you have no personal file memorandum of the conversation?

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2 A. All of my files were turned over.

3 Q. To BAT?

4 A. To our people, to our counsel, who
5 turned them over.

6 Q. You did not intend to leave with Mr.
7 Hurley a belief from your conversation with him
8 that there was to be no input on the name of the
9 new line extension from Philip Morris Australia?

10 A. There was very little room for question
11 in my mind. I expressed that to Mr. Hurley and
12 gave him an overview of what we felt was the value
13 of Kent Golden Lights globally.

14 What he perceived as what he could do I
15 don't know, but there was no question in my mind
16 that Hamilton Hurley left my office with a very
17 good understanding of what was happening with Kent
18 Golden Lights in the United States and so that he
19 could properly evaluate it in his own mind, what I
20 had in mind for this brand on a worldwide basis.

21 Q. What was the purpose which you had in
22 including the position statement of Mr. Howley in
23 your letter to Mr. Hurley? Why did you send that
24 along?

25 A. That was in the same vein that I

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2 expressed to Ham Hurley our total activity up to
3 that time in the United States and our plans on a
4 worldwide basis because of -- and some of that
5 information I considered quite confidential. I
6 passed it to a licensee and with the same vein of
7 confidentiality and trust I passed to him the
8 position paper so that he would know what we were
9 doing in Europe. I would not want Hurley to walk
10 out of my office with a very strong discussion on
11 Kent Golden Lights and to find out from somebody
12 else that we had marketed Kent Special Mild in
13 Europe.

14 Q. When you testified that you had a
15 strong belief in the effectiveness of the new
16 brand, Kent Golden Lights, what was that belief
17 based upon back in December of 1975?

18 A. Based upon the very early results from
19 test market and based upon judgment and based
20 upon --

21 Q. Excuse me. Was this your own judgment
22 or the judgment of people in Lorillard?

23 A. Collective judgment.

24 MR. GOLDBRENNER: Was there anymore you
25 wanted to say?

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2 Q. Go ahead, I didn't mean to cut you off.

3 MR. GOLDBRENNER: Is there anymore to
4 your answer or are you finished?

5 THE WITNESS: You mean on Golden Lights?

6 MR. GOLDBRENNER: Just to the last
7 question.

8 MR. COHEN: I'll give you further
9 opportunity.

10 MR. GREENBAUM: Off the record.

11 (Discussion off the record.)

12 Q. When you met with Mr. Hurley on
13 November 17 and 18 and expressed these thoughts to
14 him about the success and potential success of
15 Kent Golden Lights, how long had that brand been
16 in test market in Maine?

17 A. A couple of weeks.

18 Q. And your judgment --

19 A. I believe it was a couple of weeks.

20 Q. In your judgment was that a long enough
21 period of time to determine the potential success
22 of the brand worldwide?

23 A. The potential for success worldwide
24 when one folds in or takes into account some of
25 the problems that the parent brand had worldwide

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that paralleled the USA problems.

Q. What were they worldwide the problems?

A. Some of the sales were static, the brand was starting to be perceived as an older brand, that it may have reached its peak in some markets and that consumers were looking for lighter cigarettes.

Q. Was there a degree of unanimity among top officials at Lorillard on the subject of the worldwide potential of Kent Golden Lights at this time?

A. Yes.

Q. In your judgment how long does it take to read a test market in normal circumstances before you can form a conclusion about the viability of the product being marketed?

A. Well, if there is such a thing as normal it could take anywhere from 90 days to get a reading to 180 days. Some brands have been left in the marketplace for a year.

Q. What were the factors that caused you to feel that Kent Golden Lights had this potential for success worldwide after it had only been in the test market for a week and a half?

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MR. GOLDBRENNER: Objection. I don't know if the date sequencing is correct.

Q. We are talking about the period during which the brand was in test market in Maine prior to the date of your meeting with Mr. Hurley on November 17 and 18, whatever that period was. It was substantially less than the 90 days that you just used as an illustration.

A. Yes, but that was -- if there is such a thing as a normal situation, I answered that question.

Q. What was there about the situation in Maine which gave you such confidence?

A. Golden Lights at the time, I was not aware of it, but was also made available in other markets, Arizona and New York before Maine. My input was from my counterparts in domestic of what was happening. It was literally a daily review basis because of the interest in the brand. Lorillard in its history of selling cigarettes and in my history associated in this industry and with Lorillard have never seen a product achieve consumer acceptance from Day one such as Kent Golden Lights.

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1
2 Q. How were you measuring at that time
3 consumer acceptance, by sales?

4 A. Sales.

5 Q. Sales volume?

6 A. Consumer purchases and repeat purchases.
7 It was a phenomenon. It was not the norm.

8 Q. How were you as a company measuring
9 repeat purchases during that limited period of
10 time?

11 MR. GOLDBRENNER: I'm going to object
12 to revealing that as a trade secret.

13 MR. COHEN: Back in 1975?

14 MR. GOLDBRENNER: Let me find out.

15 (Witness confers with counsel.)

16 MR. GOLDBRENNER: I'll let him answer
17 it.

18 A. Would you repeat the question.

19 (Record read.)

20 A. That question I cannot answer, but I
21 was given the results.

22 Q. You were told that there had been
23 repeat purchases?

24 A. That there had been an absolute
25 fantastic acceptance and off take.

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Q. Do you at present have any knowledge of the test marketing efforts if there were any, in Arizona and New York?

A. No.

Q. Following your meetings in New York with Mr. Hurley on November 17 and 18, 1975, did you instruct any employees under your jurisdiction to keep in touch with Mr. Hurley about a new line extension in Australia?

A. Yes.

Q. Who were they?

A. John Howley, John Roberts, Tom Jones and Paul Clark.

Q. Mr. Clark was an employee of Loews up in Hong Kong?

A. Yes.

Q. His title?

A. Director Far East operation.

MR. GREENBAUM: You said of Loews.

MR. COHEN: I'm sorry, Lorillard.

Q. Messrs. Jones, Howley and Roberts were located where, stationed where?

A. Messrs. Howley and Roberts in New York City and Mr. Jones, Dr. Jones in Greensboro, North

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1
2 Carolina.

3 Q. What is Dr. Jones's full name?

4 A. S.T. Jones.

5 Q. Following the meeting did you have a
6 discussion with Paul Clark with respect to making
7 a trip to Australia in April of the following year
8 to meet with Mr. Hurley?

9 A. I believe there was, yes.

10 Q. In fact, did not Mr. Clark visit with
11 the Philip Morris Australian subsidiary on April
12 26 and 27 of 1976 in Melbourne?

13 A. I believe he did.

14 MR. COHEN: I'd like to mark as
15 Defendant's Orcutt 42 a memorandum from Mr. E.
16 Clark to Mr. O'Toole dated May 5, 1976.

17 (Whereupon, document above referred to
18 was marked as Defendant's Orcutt Exhibit 42
19 for identification, as of this date.)

20 Q. Have you reviewed that?

21 A. Yes.

22 Q. Turning to page 5 of that document,
23 there is a reference on that page to a "Come/stay
24 creative." Would you explain what that reference
25 means?

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2 A. That was the lead line from an
3 advertising campaign that was come for the filter,
4 stay for the taste.

5 Q. There is a further reference in that
6 section of the page to a repositioning project
7 which had been completed. What does that have
8 reference to?

9 MR. GREENBAUM: That's paragraph 5
10 you're referring to?

11 MR. COHEN: That's correct, under the
12 general heading "other points covered."

13 A. That would have to do with the
14 repositioning of Kent through a new advertising
15 campaign.

16 Q. I show you now a document which has
17 been marked Defendant's Exhibit 34 which is
18 entitled "Kent current position" and dated April
19 23, 1976. I ask you if that is the results of the
20 repositioning project to which reference is made
21 in the previous exhibit?

22 A. I don't know.

23 Q. The exhibit previously marked 42, the
24 memorandum from Mr. Clark to Mr. O'Toole, I have
25 one more question on that. Who is Mr. E.W.

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O'Toole, and what position did he hold in Lorillard at that time?

A. Mr. O'Toole at the time was director of operations.

Q. What was the nature of his duties?

A. He had day-to-day responsibility for the management of our business and the regional managers reported directly to Mr. O'Toole.

Q. Where was he stationed?

A. New York.

Q. Is he still stationed in New York?

A. No.

Q. Does he still work for Lorillard?

A. No, he does not.

Q. I think you told me this, but where was Mr. Clark stationed in May of '76?

A. Hong Kong.

Q. Did you have occasion to speak to him following your receipt of a copy of his trip Report?

A. I spoke to Mr. Clark on a regular basis. I probably spoke to him subsequent to the receipt of that, but any specific discussion I can't recall.

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2 MR. COHEN: Would you mark for
3 identification as Defendant's Orcutt Exhibit 43 a
4 letter dated May 10, 1976, to Mr. Orcutt from Ham
5 Hurley.

6 (Whereupon, document above referred to
7 was marked as Defendant's Orcutt Exhibit 43
8 for identification, as of this date.)

9 MR. GOLDBRENNER: Off the record.

10 (Discussion off the record.)

11 MR. COHEN: Would you mark as
12 Defendant's Orcutt Exhibit 44 a memorandum from
13 Mr. Orcutt to Mr. Clark dated May 27, 1976; and as
14 Defendant's Exhibit 45 a memorandum from Mr. Clark
15 to Mr. Orcutt, dated June 6, 1976.

16 (Whereupon, documents above referred to
17 were marked as Defendant's Orcutt Exhibits 44
18 and 45 for identification, as of this date.)

19 Q. Forty-four is the memorandum from Mr.
20 Orcutt to Mr. Clark, and 45 is the memorandum from
21 Mr. Clark to Mr. Orcutt. Your answer, sir, they
22 are copies of internally generated documents?

23 A. Yes.

24 Q. Turning to Defendant's 45, the
25 memorandum from Mr. Clark to Mr. Orcutt and the

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1
2 second page of that, first paragraph under
3 "recommendations," there is again a reference to a
4 recent repositioning project for Kent just
5 completed by Philip Morris. Would you state that
6 Defendant's 44 probably is the product of that
7 repositioning?

8 A. I'd state it probably is. I said
9 earlier I could not state that, but it probably is.

10 Q. On page 1 of Defendant's Exhibit 45
11 there is a reference to a brand extension, "i.e.
12 Kent Golden Lights are a mild brand." On page 2
13 there is a reference to "It may be a good idea to
14 get a verbal commitment to launch a Kent Mild in
15 Australia." Is it fair to state that Mr. Clark at
16 least believed at that time, June 6 of 1976, that
17 the line extension for Australia could consist of
18 a brand to be entitled Kent Mild?

19 MR. GOLDBRENNER: Could you hold it for
20 a minute please. Off the record.

21 (Discussion off the record.)

22 MR. GOLDBRENNER: I will object to the
23 form, but I'll let him answer.

24 A. My distinct interpretation is that
25 there is an interchangeability between the words

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light and mild, and it could mean a line extension, not necessarily that it had to be called mild.

Q. Or not necessarily that it had to be called Golden Light, light or mild?

A. Correct.

MR. GOLDBRENNER: Just for the record, if you look at page 3 you will see a line that says, "In addition, the Kent Golden Lights project is one which most certainly has a future for growth in light of the increased emphasis on T&N in the marketplace." Mr. Orcutt, was that a part of the letter designated Exhibit 45 what I just read?

THE WITNESS: Yes, it was. The Kent Golden Lights project is more definitive of the discussion than the word mild.

Q. Following the meeting of your representatives with Philip Morris in April of 1976, there was another meeting in June of that year, was there not, between Mr. Hurley and Mr. John Howley in New York?

A. Yes.

MR. COHEN: Would you mark this document Defendant's Orcutt Exhibit 46. It is a

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document dated June 23, 1976, from Mr. Howley to Mr. Clark.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 46 for identification, as of this date.).

Q. Mr. Orcutt, is this an internally generated memorandum of Lorillard?

A. Yes.

Q. If you will notice page 2 of that document copied various individuals including yourself. One of the parties copied is a W. Edwards. Who might he be?

A. William Edwards, our advertising manager, international.

Q. Subsequently in August the 1st through the 3rd of 1976, Mr. Clark had another meeting with Mr. Hurley, did he not?

MR. GREENBAUM: Do you have a document?

A. In that time frame, maybe, but I can't confirm it unless I...

MR. COHEN: I'd like to have marked for identification as Defendant's Orcutt Exhibit 47 a memorandum dated August 6, 1976 from Mr. Clark to Mr. O'Toole.

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(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 47 for identification, as of this date.)

MR. GREENBAUM: Off the record.

(Discussion off the record.)

Q. Mr. Orcutt, is Defendant's Exhibit 47 a copy of a document that was internally generated by Lorillard?

A. It appears to be.

Q. And it refers, does it not, to a trip to Melbourne on August 1st through 3rd of '76, by Mr. Clark?

A. Yes.

Q. If you will look at page 4 of the memorandum under the heading "Renegotiation of license agreement" a statement is made that Mr. Hurley had advised Mr. Clark during the trip that he had had a telephone conversation with you in New York and that you were basically in agreement with Mr. Hurley's letter to you of May 10th. Is that an accurate statement?

A. Now I have to go back and look at the May 10 letter. I already saw it.

MR. GREENBAUM: That's Exhibit 43.

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2 A. I have it. The statement in Exhibit 47
3 goes beyond what my position was.

4 Q. Did you in fact have a telephone
5 conversation with Mr. Hurley in which the subject
6 of the new license agreement was discussed?

7 A. Yes, I do recall a telephone discussion.

8 Q. Do you recall approximately when that
9 might have taken place and who initiated the call?

10 A. I believe the call was initiated by
11 Hamilton.

12 Q. Do you know approximately when in terms
13 of the month?

14 A. Sometime between then. I don't recall
15 the -- I'm sorry, not...

16 Q. To what extent does the comment
17 referred to by Mr. Clark go beyond the subject of
18 your telephone conversation? Why don't you just
19 briefly tell us the substance of your telephone
20 conversation with Mr. Hurley as you recall.

21 A. It correlates in regard to that there
22 would be an increased royalty. There was
23 agreement in principal on that. Hurley says that
24 on May 10. It correlates insofar as Hurley says
25 in the May 10 letter, "I have no problem

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1
2 whatsoever with undertaking the continuing level
3 of expenditure," et cetera. It does not in regard
4 that it fails to mention Kent Golden Lights. It
5 does not insofar as the Exhibit 46 says, I'm in
6 agreement and Hurley's letter of May 10th says
7 he's not in agreement with me, so I have
8 difficulty with him expressing that I'm in
9 agreement with him. That's relative --

10 Q. This agreement is relative to the Kent
11 Golden Lights?

12 A. It wasn't a disagreement, it was a
13 question of negotiations, but he says in his
14 letter of May 10th, he said he would have -- there
15 is two elements -- "the following two elements
16 which represent dimension which I believe merits
17 further consideration." Then he says ex-factory
18 price somewhere in here, an increase in the net
19 ex-factory price. That was a definitive part of
20 my letter to him on December 18th that was a part
21 of discussions that we had. So I find it
22 difficult that Hamilton Hurley or that Paul Clark
23 could see say to me that we are basically in
24 agreement. There are just too many conflicts.
25 The agreement we had was to continue to talk.

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Q. Did you in fact receive a copy of Defendant's 47, the report from Clark to O'Toole?

A. If somebody has a clearer copy that might show my initials, I would confirm it. Otherwise I would have to say I believe I did but I could not...

Q. I do not believe there is any reference in the document to your being directly copied.

MR. GREENBAUM: There is a stamp.

A. There is a stamp. If someone has a better copy. It looks like they may be in there, but I wouldn't want to say it unless they are.

Q. In any event, had you at some point in early August of 1976 become aware of the view of Philip Morris Australia that an introduction of a line extension attempt was not regarded by them as opportune at the time? Did someone tell you that that was their view?

A. Yes, I was aware of that.

Q. What steps, if any, did you take upon learning that that was their view? Did you give any instructions to any of your personnel? Did you have a discussion with any of your personnel about the views as expressed by Philip Morris in

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Australia?

A. My views I think are best expressed by what my actions were. It wasn't very long after that that I dispatched Jones, Tom Jones to go out and work on the Kent Golden Lights project with the full acceptance and authority of Philip Morris, Ltd. Australia.

Q. Tom Jones did you say?

A. Tom Jones. He's our manufacturing man from Greensboro. I didn't get very nervous or upset about it. I viewed it as a part of the negotiations. The earlier that Philip Morris, Ltd. committed to the absolute extension of Kent Golden Lights the less they had to hold back for terms of the license agreement. So I didn't view it with any great alarm.

Q. When you referred to Tom Jones, are you referring to the man you earlier discussed as S.T. Jones?

A. Yes.

Q. He was your manager of product development for international at the time?

A. Manufacturing.

Q. Manufacturing?

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A. Manufacturing and product development.

Q. Mr. Orcutt, you were not stating that Mr. Jones was dispatched to Philip Morris Australia only to discuss the subject of Kent Golden Lights?

A. No, but that was a specific part of his trip agenda and itinerary.

MR. COHEN: Would you mark, please, as Defendant's Orcutt Exhibit 48 a file memorandum by P. Francis dated November 15, 1976.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 48 for identification, as of this date.)

Q. I'd like to direct your attention to page 3 of that document under the heading H. Hurley. There is a reference in the document to Mr. Jones being asked by Philip Morris if any further thought had been given to the production of True by Philip Morris, Ltd. Was the question or the issue of the production of True by Philip Morris, Ltd. a proposal known to you at any time?

A. Yes.

Q. Would you just briefly state your understanding of what was asked by which company

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1 and the general nature of the discussions on that
2 subject between the two companies?
3

4 A. Within the development of the
5 Australian market to lighter cigarettes, lower tar
6 and nicotine, Kent, a major brand in the United
7 States fit that position extremely well. There
8 was an agreement that we would both look into the
9 viability of Philip Morris, Ltd. Australia making
10 True under license.

11 Q. Who suggested that Philip Morris
12 Australia manufacture True under license? Did
13 that suggestion originate with Lorillard or with
14 Philip Morris, Ltd.?

15 A. I'm not sure which party it came from
16 or out of a mutual discussion or review.

17 Q. This letter makes reference to Jones
18 asking Philip Morris, Ltd. of an expression of
19 interest and Mr. Hurley in effect turning it down.
20 Is that your understanding of what transpired?

21 A. Yes. I believe the True discussions or
22 interest rather than discussions emanated sometime
23 prior to the interest in or the discussions on
24 Kent Golden Lights.

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25 MR. GOLDBRENNER: Is this a convenient

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time to take a break?

MR. COHEN: Yes.

(Recess taken.)

MR. COHEN: Would you mark as Defendant's Orcutt Exhibit 49 a document entitled "minutes of meeting" and dated November 17, 1976.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 49 for identification, as of this date.)

Q. Would you take a look, please, at Defendant's Exhibit 49. I ask you whether or not that is an internally-generated document of Lorillard's?

A. It appears to be.

Q. Would you turn, please, to page 3 of that document under the heading "Kent Golden Lights." By the way, did you receive a copy of these minutes as reflected by page 3?

A. Again, I don't see my initials on them, but I have a recollection of it.

Q. Do you have a present recollection of reviewing with anyone or seeing any document which informed you as to what had taken place at the meeting in the New York offices of Lorillard on

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November 16th?

A. That would be this document.

Q. That's right, but I'm asking whether you have any independent recollection at present that you had been informed in one fashion or another, that you had been informed there was a meeting and what was discussed?

A. Yes, I knew of the meeting.

Q. Turning now specifically to page 3 and section 4 dealing with Kent Golden Lights, is it your present understanding that what is stated in those paragraphs on page 3 is what you had been informed had taken place at that meeting?

A. Yes.

Q. Is it not a fact that worldwide around about this time it was the thinking of Lorillard, if not already the practice, that both Kent Golden Lights, if sold abroad and Kent Special Mild as sold abroad, would both have the present United States packaging which was used for Golden Lights?

A. Yes.

MR. COHEN: Would you mark, please, as Defendant's Orcutt 50 a memorandum dated July 29, 1976, from Roland Hammer to John Howley.

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(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 50 for identification, as of this date.)

Q. Mr. Orcutt, is this a copy of an internally-generated document of Lorillard's?

A. It appears to be.

Q. Who was Mr. Hammer?

A. The manager European region.

Q. Did he report to Mr. Howley at the time of this memorandum?

A. He reported to Mr. Barrell.

Q. Mr. Barrell was?

A. Director of operations, Europe.

Q. If you will notice, the first paragraph of the letter refers to "research plans concerning "Kent Golden Lights and Special Mild." Are you familiar with the research plans referred to?

A. That there was going to be some research accomplished or done.

Q. Do you know who authorized the generation of such research?

A. No.

Q. Do you know the purpose for which the research was to be conducted?

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2 A. To determine the understandability of
3 the consumer between the names Kent Special Mild
4 and Kent Golden Lights.

5 MR. COHEN: Would you mark as
6 Defendant's Orcutt Exhibit 51 a letter dated
7 August 6, 1976, from Mr. Howley to Mr. Orcutt.

8 (Whereupon, document above referred to
9 was marked as Defendant's Orcutt Exhibit 51
10 for identification, as of this date.)

11 MR. COHEN: Would you also mark as
12 Defendant's Orcutt Exhibit 52, a document entitled
13 "Kent Golden Lights/Special Mild" and dated
14 February 11, 1977.

15 (Whereupon, document above referred to
16 was marked as Defendant's Orcutt Exhibit 52
17 for identification, as of this date.)

18 Q. Mr. Orcutt, would you look, please, at
19 Defendant's 51, which is a memorandum from Mr.
20 Howley to Mr. Orcutt and Defendant's 50, which is
21 a memorandum from Mr. Hammer to Mr. Howley.
22 Defendant's Exhibit 51 has in its first paragraph
23 a statement, "Attached is Roland Hammer's memo
24 covering research, et cetera" Does that statement
25 refer to Exhibit 50, the memo from Mr. Hammer to

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Mr. Howley of July 29?

A. It appears to.

Q. Exhibits 50 and 51 refer to research on the issue of Kent Special Mild, Golden Lights and consumer preference. Is Defendant's Exhibit 52 the research ultimately generated by that project?

A. I'll have to study it.

MR. GREENBAUM: I believe there is a question open.

MR. COHEN: Yes.

MR. GREENBAUM: What was the question.

(Record read.)

A. No.

Q. Would you explain, please, what that document is?

MR. GREENBAUM: Referring to 52.

MR. COHEN: Yes.

Q. And who generated it. That is a document entitled "Kent Golden Lights/Special Mild" and dated February '77, and the author appears to be someone whose initials are REB.

A. That's correct.

Q. Could you tell me what the document is?

A. Oh, all right. I'll tell you. Yes, it

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1
2 sets out a series of options on dealing with the
3 duty free market in Europe and whether that market
4 should be serviced or supplied with Kent Special
5 Mild, Kent Golden Lights or a combination of Kent
6 Special Mild in the box packing and Kent Golden
7 Lights in the 100 millimeter packing; further
8 cutting out of the total duty free area those
9 terminals that carry a heavy proportion of U.S.
10 travelers. And -- that's it.

11 Q. Who would have been responsible for
12 generating this document?

13 A. The European region.

14 Q. What organization or department within
15 the organization would be responsible?

16 A. It would be a combined effort of those
17 people reporting to Mr. Barrell, the director of
18 operations, it would be thoughts of our various
19 representatives in Europe, input to him, input to
20 Roland Hammer; their collective thoughts and then
21 synthesized by Barrell in this document.

22 Q. Who do these people ultimately report
23 to?

24 A. Roy Barrell.

25 Q. Who does he report to?

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2 A. To Mr. O'Toole.

3 Q. Mr. O'Toole reports in the chain of
4 command to whom?

5 A. Myself.

6 Would you tell me what discussion was
7 had in New York at headquarters by your operation
8 upon receipt of this document? Was the
9 recommendation implemented, for example?

10 A. To my knowledge, it was not implemented.

11 Q. Was there discussion in which you
12 participated over the question of implementation?

13 A. Yes, there would have been.

14 Q. Do you have any actual recollection of
15 that at the present time?

16 A. Yes, I -- this document or this
17 recommendation, rather, within this document has a
18 basic conflict with New York's and my personal
19 feelings and judgments that the duty free market
20 should be serviced by Kent Golden Lights.

21 Q. At this time, February 11 of 1977,
22 which is the date of the document, was there
23 already pretty high level discussion within
24 Lorillard about the proposed sale of its European
25 operations?

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2 A. I have no knowledge. I cannot answer
3 that question.

4 MR. GOLDBRENNER: May we note for the
5 record that the date February 1977 is handwritten
6 on a typewritten document.

7 MR. COHEN: I don't think so.

8 MR. GREENBAUM: Look on the last page.

9 MR. GOLDBRENNER: I'm sorry.

10 Q. At what point in time did you as head
11 of international become aware of the plans of
12 Lorillard to dispose of its international division?

13 A. I don't know when the decision to
14 dispose of its assets in international was made.
15 I became aware of discussions in April of 1977.

16 Q. When you first became aware that there
17 were negotiations ongoing to sell the division,
18 how did that knowledge come to your attention?

19 A. A telephone call.

20 Q. Who would that have been from?

21 A. The president of Lorillard, C.H. Judge.

22 Q. Do you know at the present time whether
23 or not negotiations on the sale of the division
24 were conducted by Mr. Judge or by officials from
25 the parent, Loews, or a combination of the two?

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1
2 A. NO.

3 Q. Had there been comment from time to
4 time prior to the sale of the division about its
5 profitability or lack thereof on the echelons in
6 which you operated?

7 A. No.

8 Q. Did the fact that there were ongoing
9 negotiations which could lead to the sale of the
10 division come as a surprise to you?

11 A. Not as a surprise.

12 Q. Had there been comments before within
13 the echelon in which you moved at Lorillard that
14 there was a possibility that the company might one
15 day wish to dispose of its international
16 operations?

17 A. Only insofar as anything one owns is
18 potentially -- potential for sale.

19 Q. Do you recall the approximate time when
20 you first became aware of the possibility of a
21 sale of the international business, as best you
22 can recall?

23 MR. GOLDBRENNER: He's already answered
24 that.

25 A. April 1977.

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2 Q. You testified that Defendant's 52
3 represents a basic conflict in the manner in which
4 you approached the question of what the principal
5 low tar brand of Lorillard ought to be in Europe
6 and what the local management believed; is that a
7 fair statement?

8 A. No, that's too encompassing.

9 Q. Would you sort of zero in on what you
10 meant when you said represented a conflict.

11 A. In the most advantageous name -- I'm
12 sorry. The conflict was my feeling was that the
13 brand should be Kent Golden Lights worldwide. The
14 European management felt that it should be Special
15 Mild.

16 Q. Were discussions held between yourself
17 and the European management on that issue
18 following your receipt and perusal of Defendant's
19 52?

20 A. There were ongoing discussions pre and
21 post.

22 Q. Who were those discussions with?

23 A. Principally with Roy Barrell.

24 Q. Who does Mr. Barrell work for now?

25 A. At the present time?

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Q. Yes.

A. Brown and Williamson International.

Q. What was the general nature of the discussions subsequent to the receipt of this memorandum?

A. Mr. Barrell's desire to have it implemented; my desire to pursue a course of Golden Lights.

Q. Was that issue resolved prior to the sale to BAT of the international division?

A. No.

MR. COHEN: Would you mark as Defendant's Orcutt Exhibit 53 a document entitled "Kent Special-Mild Europe" and containing on the bottom of the page an ink notation March 14, 1977.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 53 for identification, as of this date.)

MR. COHEN: Would you also mark as Defendant's Orcutt Exhibits 54 and 55 the following: Document entitled "management review." Can anyone make out the date in pencil?

MR. GREENBAUM: It looks like 1975. Also Project Recovery refers to a 1975 date.

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MR. COHEN: Let's mark that as Defendant's Orcutt Exhibit 54.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 54 for identification, as of this date.)

MR. COHEN: Mark as Defendant's Orcutt Exhibit 55 a document entitled "Europe-Kent Special Mild," dated December 22, 1976.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 55 for identification, as of this date.)

Q. Would you look, please, at Defendant's Exhibit 54, entitled "management review," and look also at Defendant's Exhibit 36 entitled Project Recovery. Mr. Orcutt, is Defendant's 54 a document that was prepared in connection with Project Recovery which is described in Defendant's 36?

A. I don't have away of tying these two together.

Q. Would you refer to the first paragraph of the management review document, 54, which refers to Project Recovery by name.

A. Okay.

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2 Q. Would you refer in connection with this
3 to page 4 and the paragraph dealing with name
4 strategy. Is it conceivable that Defendant's 54
5 entitled management review was prepared by
6 European management in support of the Project
7 Recovery document also in 1975 and forwarded to
8 New York?

9 A. European management produced a -- a
10 whole folder of backup information to support
11 Special Mild. I'm sorry, I can't tie those two
12 together for you.

13 Q. Can you tell me whether or not
14 Defendant's Exhibit 54 was prepared in or about
15 1975?

16 A. I don't know.

17 Q. Is it fair to state that throughout the
18 period of the 1970's, from '75 up until the time
19 of the sale of the international business to BAT,
20 it was the consistent position of European
21 management that the predominant low tar line
22 extension of Kent worldwide or at least in Europe
23 ought to be Kent Special Mild?

24 MR. GOLDBRENNER: That's two questions.
25 One is worldwide, and one is Europe.

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MR. COHEN: I'll rephrase that to refer specifically to Europe.

Q. Was it the fairly consistent position of European management during the period from '75 up to and including the time of the sale of the division to BAT that the preferred line extension for Kent low tar should be called Kent Special Mild when sold in Europe?

A. Yes but there were also discussions on Kent Golden Lights.

Q. As late as 1977, March of 1977, is it fair to state that in duty-free shops in Europe both Kent Special Mild and Kent Golden Lights could be purchased?

A. I'd have to see some backup. I can't recall Special Mild being in duty-free shops.

MR. COHEN: Would you mark, please, as Defendant's Orcutt Exhibit 56 a document the first line of which reads "Country: Europe/duty free (export Greensboro)."

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 56 for identification, as of this date.)

Q. I show you Defendant's Exhibit 56.

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A. Brand initiation form.

A. Brand initiation form.

A. This is a form that was initiated in order to request Greensboro to consider manufacture or production capability to make Special Mild.

Q. For sale in duty free shops in Europe?

A. Yes.

Q. Do you know whether or not that request was ever implemented?

A. It's very close to the sale date so I don't know. I can't say absolutely. I don't believe so.

Q. Turning to Defendant's 55 for identification, entitled "Europe-Kent Special Mild" and dated December 22, 1976, can you tell me what that document is?

A. It represents a review by the European region of where Kent Special Mild is at that time and where they want to take the brand in the

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future.

Q. Was it not also a result of a decision reached between New York and European management in June of 1976 to research consumer understanding of the brand name Kent Golden Lights in a number of European countries?

A. I can't tie --

Q. I'd like to refer you to page 3 under the heading "product."

A. Yes.

MR. COHEN: Page 3 indicates that there were research appendices to this report. Mr. Greenbaum, do you have copies of those research appendices?

MR. GREENBAUM: Mr. Weinberg?

MR. WEINBERG: No.

MR. GREENBAUM: I don't recall ever seeing them and Mr. Weinberg, who is as familiar with the documents as anyone doesn't recall seeing them.

Q. Would you know who, sir, at Lorillard might retain copies of these research appendices or if they indeed might still exist?

A. At that time they would have been in

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the international files, in the country files.

They would have been a part of international files.

Q. Would they have been turned over to BAT?

A. They would have been.

MR. COHEN: Would you undertake a search of your records for that.

MR. GREENBAUM: We'll check again and see if we can find these appendices.

Q. You, yourself, had you not been planning to visit Australia in late January or early February of 1977 in order to discuss a new license agreement with Mr. Hurley?

A. Yes.

Q. And that visit was subsequently postponed to the seventh or the fourteenth of March 1977?

A. Yes.

Q. And thereafter there was a further postponement, was there not, and then a date was given for the last week of March or first week of April?

A. I don't recall that, but it's possible.

MR. COHEN: Would you mark as Defendant's Orcutt Exhibit 57 a note dated April

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20, 1977, from Paul Clark to Hamilton Hurley.
Would you mark that, please, as Defendant's 57.

(Whereupon, document above referred to
was marked as Defendant's Orcutt Exhibit 57
for identification, as of this date.)

MR. GOLDBRENNER: This is your retyped
version of the documents?

MR. COHEN: That comes directly from
the appeal book on the Australian case.

Q. Referring you to Defendant's 57, do you
recall having seen a copy of that document at any
time?

MR. GOLDBRENNER: The April 20 letter?

MR. COHEN: Yes. I believe he
testified concerning that in the Australian action.

A. I don't recall having seen a copy of
this letter.

MR. GOLDBRENNER: Or the original
letter.

A. I recall the circumstances that set it
up.

Q. Were you aware that Mr. Clark had
written to Mr. Hurley on or about April 20, 1977,
informing Mr. Hurley that if Lorillard was not

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2 able to negotiate a new license agreement prior to
3 the date of expiration of the existing agreement
4 which was November of 1977, Lorillard would extend
5 the existing agreement by six months or until a
6 new one could be executed? Were you aware of that?

7 A. Yes.

8 Q. At that time it's fair to state that
9 Lorillard was heavily engaged in negotiations with
10 BAT for the sale of the business, was it not?

11 A. The question of heavily engaged I'm not
12 aware. There were -- I was aware there were
13 discussions.

14 Q. Was Clark aware at that time that there
15 were negotiations?

16 A. No, no, not to my knowledge.

17 Q. In fact, as far as you know, you were
18 the only one in international who was privy to
19 that news in April?

20 A. Yes.

21 MR. COHEN: Would you mark, please, as
22 Defendant's Orcutt Exhibit 58 a copy of a telex
23 from a Mr. Botticelli to Mr. Hurley dated June 2,
24 1977.

25 (Whereupon, document above referred to

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2 was marked as Defendant's Orcutt Exhibit 58
3 for identification, as of this date.)

4 Q. Mr. Orcutt, is it fair to state that on
5 June 2, 1977, it became a matter of public
6 knowledge that BAT industries was negotiating with
7 Loews with regard to the sale of Lorillard's
8 overseas tobacco operations?

9 A. There was an awareness that came to
10 public light. June 2, I would accept that date.

11 Q. Did you subsequently have a meeting in
12 early June with Mr. Hurley to discuss the proposed
13 sale of Lorillard's overseas business to BAT?

14 A. No.

15 Q. Did you not meet in New York with Mr.
16 Hurley in early June 1977?

17 A. Yes.

18 Q. What was the occasion for the meeting?

19 A. Requested by Mr. Hurley to determine
20 the status of our license negotiations and to ask
21 me if it were valid that Loews and BAT were in
22 discussions for the sale of the international
23 business and further, that if those discussions
24 were in fact going on and Lorillard wished to sell
25 its international business, Philip Morris, Ltd.

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Australia would like to buy the trademark Kent.

Q. Did you tell him in substance that you just couldn't talk to him without your lawyers?

A. No.

Q. What did you tell him?

A. I said in substance I can make no comment.

Q. Did you meet again with Mr. Hurley in June?

A. Not to my recollection.

Q. Did Mr. Hurley meet with any other individuals of Lorillard in June, to your knowledge?

A. Not to my knowledge.

Q. Between May, mid-May and the end of June of 1977, did you have occasion to meet with individuals of BAT with regard to the transfer of the business of Lorillard, the overseas business?

A. No.

Q. Did you at any time have occasion to meet with Mr. Palmer, John Palmer, the trademark man?

MR. GOLDBRENNER: Could you state the time period, please.

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MR. COHEN: At any time.

MR. GOLDBRENNER: To the present day?

MR. COHEN: Yes.

A. I met Mr. Palmer.

Q. Did you meet with him at any time in the period between May 13, 1977, and June 25, 1977?

A. I do not recall if Mr. Palmer was present.

Q. Was anyone on your staff deputized by yourself to coordinate with Mr. Palmer in a general review of Lorillard's international trademarks?

A. At what time?

Q. During the period May 13, 1977, up to and including June 25, 1977.

A. Between May and June 22, no. Between May and June 22, no.

Q. At any time was anyone on your staff deputized to discuss the existing state of the trademarks that Lorillard had overseas with Mr. Palmer or anyone on Mr. Palmer's staff?

A. Not by myself.

Q. Do you know whether or not anyone did, whether deputized by yourself or not?

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2 A. I don't know.

3 Q. Pursuant to the sale agreement s
4 division had certain responsibilities, did it not,
5 with respect to the turn over of documents and
6 assignment of marks to BAT?

7 A. Yes.

8 Q. Was there any one individual deputized
9 by yourself to carry out the responsibilities
10 imposed on your division by the sale agreement or
11 imposed on Lorillard by the sale agreement?

12 A. No. The responsibility of cooperation
13 rested with all of the individuals in New York
14 with respect to their various discipline and
15 assignments.

16 Q. Who was in charge of trademark records
17 at Lorillard with respect to international marks?

18 A. Our legal department.

19 Q. Who in the legal department?

20 A. Messrs. Goldbrenner, Gastman, Stevens I
21 believe all worked on it.

22 Q. As part of the documents turned over by
23 your division to BAT pursuant to the asset
24 purchase agreement, was there a copy of the 1977
25 Kent marketing plan which had been received from

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Philip Morris Australia?

A. I do not recall.

MR. GOLDBRENNER: Would you identify the document.

(Handing document to counsel.)

MR. GOLDBRENNER: Could we have the question read as to this again.

MR. COHEN: I'll mark it if you want it in.

MR. GOLDBRENNER: I just want the question read.

(Record read.)

A. I cannot confirm that.

MR. COHEN: Let me show you a document which I will mark Defendant's Orcutt Exhibit 59, under the letterhead of British-American Tobacco Company, Limited, and it's dated February 10, 1978. It purports to be a letter from J.W. Groome to P.B. Smith.

(Whereupon, document above referred to was marked as Defendant's Orcutt Exhibit 59 for identification, as of this date.)

MR. COHEN: Arthur, since this document was given us in the course of Mr. Palmer's

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2 deposition in which he testified that it had come
3 from Lorillard, will you concede for purposes of
4 this deposition that the document in fact was
5 turned over by Lorillard to BAT?

6 MR. GREENBAUM: That's what it says in
7 the letter, so I will so concede.

8 Q. Would you turn to the first page of the
9 document which is entitled "Australia 1977 Kent
10 marketing plan." There is a comment on that page
11 that indicates it has been reviewed and approved
12 by Lorillard Asia Ltd. Hong Kong. Who would have
13 been in charge of Lorillard Ltd. in Hong Kong?

14 A. Paul Clark.

15 Q. Was it part of the duties of his
16 position to have himself or someone on his staff
17 review marketing plans of licensees such as Philip
18 Morris Australia?

19 A. Yes.

20 Q. What was the purpose of the review and
21 the need for approval?

22 A. The purpose of review was to
23 familiarize himself with what our licensee was
24 doing and going to do on behalf of a licensed
25 product. The purpose of review was that Lorillard

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2 within its license agreement held the right to
3 review marketing plans and see that they met the
4 provisions of the license agreement.

5 Q. And the need for approval, does that
6 mean they in effect would have a veto over the
7 marketing plans of the licensee?

8 A. Yes.

9 MR. COHEN: May I have marked, please,
10 a telex dated August 19, 1977, from a Mr. Goddard
11 to Mr. Orcutt as Defendant's Orcutt Exhibit 60 for
12 identification.

13 (Whereupon, document above referred to
14 was marked as Defendant's Orcutt Exhibit 60
15 for identification, as of this date.)

16 Q. I'd like to show you Defendant's Orcutt
17 60 and ask whether or not you received the
18 original of that document.

19 A. I received it.

20 Q. My next question is: did you respond
21 to it?

22 A. I don't recall.

23 Q. Can you tell me whether or not the
24 statement as to which confirmation is sought from
25 you by Mr. Goddard is in fact accurate?

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A. I believe it to be.

MR. COHEN: I have no further questions
of the witness.

MR. GREENBAUM: Why don't we have a
quick recess.

(Recess taken.)

MR. GREENBAUM: I have no questions.

Subscribed and sworn to before me
this _____ day of _____ 1980.

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C E R T I F I C A T E

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

I, GAIL F. RICHMAN, C.S.R., a Notary
Public within and for the State of New York,
do hereby certify:

That RICHARD H. ORCUTT, the witness
whose deposition is hereinbefore set forth,
was duly sworn by me and that such deposition
is a true record of the testimony given by
such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 21st day of May, 1981.

~~-----~~
GAIL F. RICHMAN, C.S.R.

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I N D E X

<u>WITNESS</u>	<u>EXAMINATION BY</u>	<u>PAGE</u>
Richard A. Orcutt	Mr. Cohen	

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